UPREME COURT, U. S.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 960

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COLBERG, INC., et al.,
Plaintiffs and Appellants,
vs.
STATE OF CALIFORNIA, ex rel.,
DEPARTMENT OF PUBLIC WORKS,
Defendant and Respondent.

STEPHENS MARINE, INC.,
Plaintiff and Appellant,
vs.
STATE OF CALIFORNIA, ex rel.,
DEPARTMENT OF PUBLIC WORKS,
Defendant and Respondent.

CONSOLIDATED CASES

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

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State of California

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California.

OPINIONS BELOW

(1) This action was originally decided by a judgment on the pleadings in the trial Court which was adverse to Petitioners. This opinion of the Superior Court of the State of California for the County of San Joaquin was dated May 24, 1965, and is unreported. A copy of this judgment is attached as Appendix A, Exhibit (1).

(2) The decision of the Court of Appeal of the State of California in and for the Third Appellate District was in favor of the Petitioners by a unanimous Court. This was entered December 1, 1966. It is not reported in the Official California Reports, but is reported in 55 Cal. Rptr. 159. A copy of this opinion is attached as Appendix A, Exhibit (2).

(3) The decision of the Supreme Court of the State of California was adverse to the Petitioners by a divided Court with two justices dissenting. The decision was entered October 3, 1967, and a rehearing was denied November 1, 1967, with a remittitur issuing to the trial Court affirming the original judgment on November 3, 1967. A copy of the majority opinion is attached as Appendix A, Exhibit (3). A copy of the dissenting opinion is attached as Appendix A, Exhibit (4). The decision of the Supreme Court of the State of California became final November 3, 1967. (California Rules of Court, Rule 24.)

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S. Code 1257 (3).

FEDERAL QUESTIONS PRESENTED

Two federal questions are presented. These are:

(1) Whether the Petitioners have been denied due process of law under the Fourteenth Amendment to the United States Constitution by the taking of their property without compensation.

(2) Whether the right of a state to control navigable waterways is greater in scope than that of the federal government and permits the taking of private rights of access to navigable waterways under the navigation servitude in an instance where the taking is for a purpose unrelated to the control, regulation, or improvement of navigation.

(3) The federal questions have been raised at every stage of the proceedings in the state Courts and are fundamental to the issues decided. At all times during the proceedings, the Petitioners have claimed that their property rights could not be taken for public use without compensation. At all times during the proceedings, the Petitioners have claimed that the right of the state or federal government to control navigation would not permit the taking or damaging of their property rights for a non-navigational purpose.

STATEMENT OF THE CASE

The Petitioners are two shipyard owners. For more than 60 years, they have conducted neighboring shipyards in the City of Stockton and engaged in the building and repairing of ocean-going ships, yachts

and other vessels. The Colberg yard occupies about 8 acres and the Stephens yard about 6. Both yards are situated on the Upper Stockton Channel, a natural, navigable waterway extending easterly from the turning basin of the Port of Stockton. The channel comes to a dead end about 5,000 feet east of the turning basin. Ocean-going and smaller vessels use the Upper Stockton Channel to pass between Petitioners' yards and the turning basin, from which they may navigate to the sea by way of the Stockton Deep Water Channel, Carquinez Straits and San Francisco Bay. Both yards are improved with marine ways, buildings, docks and allied facilities. Both are riparian to the Upper Stockton Channel.

In the Appendix are exhibits which illustrate the location of the yards and the construction proposed by the State of California.

Appendix B, Exhibit (1) is a map showing the Upper Stockton Channel and the course of navigation from there to the Pacific Ocean.

Appendix B, Exhibit (2) is a map of the Upper Stockton Channel showing the location of the proposed highway bridge in relation to the shipyards. On the exhibit number 49 is the Colberg yard and number 53 is the Stephens yard.

Appendix B, Exhibit (3) is an aerial photograph looking from West to East showing all facilities on the dead-end channel.

Appendix B, Exhibit (4) is an aerial photograph showing the location of the Colberg yard in relation to the proposed bridge.

The State of California proposes to construct twin freeway bridges across the Upper Stockton Channel between Petitioners' shipyards and the turning basin. The bridges will be approximately five hundred feet from the yards. These will be stationary bridges with a vertical clearance of 45 feet above water level. In conformity with federal law, the state applied for and received a permit from the Secretary of the Army and the Chief of the Corps of Engineers, specifying the 45-foot clearance. The bridge will prevent ships over 45 feet in height from passing through the channel to the shipyards. The present height restriction between the shipyards and the ocean is 135 feet, established by the twin bridges over Carquinez Straits.

The two shipyards are located on a natural *cul-de-sac*. They are the only members of the public that will be adversly affected by the construction. Other users of the short channel are unaffected by the restrictive bridge height.

Eighty one percent of the Colberg gross business involves ships that will be unable to reach its yard after the bridges are installed. The pleadings in the action establish that Colberg will lose the fair market value of its shipyard in excess of $3,000,000. The Stephens loss is alleged to be in excess of $1,400,000.

The procedural posture of the instant case is one for declaratory relief brought under the California statute that permits such a proceeding. All three of the California Courts have approved the procedure followed. The Petitioners are not seeking damages in the instant case for the loss of their land. The relief

sought is limited to a determination as to whether there has been any invasion of the Petitioners' property rights which requires compensation from the state.

ARGUMENT

It must be emphasized that the Petitioners are not contending that they have any right to compensation due to the loss of the *public* right of navigation. They do contend, however, that due to the cul-de-sac formed by the short channel upon which they are located, and the near proximity of the bridge construction to their shipyards, that they will lose *private* rights of access to the waterway which are compensable.

The full impact of the damage done by the bridge construction falls upon the two Petitioners, and upon them alone. No other person or entity will be damaged by the restricted access. The general public will benefit from the highway construction at the expense of the two private companies.

In *Bacich v. Board of Control,* 23 Cal. 2d 343, 144 P. 2d 818, the California Supreme Court had decided in 1943 that where the construction of the approaches to the Oakland Bay Bridge obstructed *highway* access rights of private owners, that the loss of such rights *were* compensable. This decision has subsequently been approved in the later cases of *Valenta v. County of Los Angeles,* 61 Cal. 2d 669, 39 Cal. Rptr. 909, 394

P. 2d 725, and *Breidert v. Southern Pac. Co.,* 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P. 2d 719.

Navigable waterways are highways of commerce no less than freeways constructed by the state. In the instant case the Petitioners contend that their rights of access are likewise compensable. A littoral owner on a navigable waterway has a private right of access from his upland to the navigable channel. (*S.F. Sav. Union v. R.G.R. Petroleum Co.,* 144 C. 134, 77 P. 823; *Shirley v. Bishop,* 67 C. 543, 8 P. 82; *Blanc v. Klumpke,* 29 C. 159; *City of Los Angeles v. Aitken,* 10 C.A. 2d 460, 52 P. 2d 585; See Gould on Waters (3rd ed. sec. 149).) The access right of a littoral owner is to be able to reach the navigable portion of the water where it borders his real property. Such a right means nothing to such an owner, however, if that is as far as he can go. Under the facts of the instant case, the Petitioners could launch ships in front of their property, but they could go no further.

The opinion of the Third District Court of Appeal for the State of California recognizes this right and the invasion thereof by the construction of the bridges in its opinion attached as Appendix A, Exhibit (2).

The California Supreme Court did not decide this property question. (See page 28, Appendix A, Exhibit (3).) The majority of the Court held that whether the Petitioners had property rights or not, the State of California could obstruct the navigable waterway for a purpose which had no connection with navigation whatsoever. It recognized that the federal government would have no such power under

navigation servitude derived from the Commerce Clause of the United States Constitution. (See pages 29-30, Appendix A, Exhibit (3).) The majority held that the State of California could obstruct a navigable waterway with a freeway bridge regardless of any private rights involved.

The critical language of the majority opinion appears on page 33 of Appendix A, Exhibit (3), where the Court states:

> "We have referred above to the paramount supervisory power of the federal government over navigable waters. This power, though superior to that of the state, is not grounded in ownership of the navigable waterways upon which it operates, but rather derives from the commerce clause of the United States Constitution, and it has been stated that it may properly be exercised *only* in order to aid navigation (citing cases) * *. *"

And on pages 34-35 of the same opinion:

> "As we have shown above, the power of the State of California to deal with its navigable waters, though subject to the superior federal power, is considerably wider in scope than that paramount power. The state, as owner of its navigable waterways subject to a trust for the benefit of the people, may act relative to those waterways in any manner consistent with the improvement of commercial traffic and intercourse."

The federal decisions have held that where private property rights are taken under the proper exercise of the navigation servitude that no compensation need

be paid to the private owner. Petitioners agree with the majority of the California Supreme Court that where the taking or damage *is not done* for a purpose of regulating or improving navigation that the federal decisions require that compensation be paid. Cases illustrating this are *United States v. Gerlach Livestock Co.*, 339 U.S. 725, 94 L. ed. 1231, 20 A.L.R. 2d 633 (taking for purposes of reclamation, not navigation) and *U.S. v. 412.715 Acres of Land,* 53 F. Supp. 143 (taking for purposes of a Navy Yard, not navigation).

In the instant case state ownership of the submerged portion of the channel involved was never raised by the pleadings upon which the matter was decided. The California Supreme Court interjected this concept of ownership to provide a foundation for its distinction between the powers of the federal government and the powers of the states over navigable waterways. Judicial notice could not have been taken of state ownership of the submerged lands as there are various private ownerships of submerged lands in California that were acquired by Mexican grant prior to the entry of the State of California into the Federal Union. The bottom of the channel involved in the present case is actually privately owned, as the Petitioners have pointed out to the California Supreme Court in their Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

It is of importance to determine if the majority of the California Supreme Court is correct in holding that the State of California has a broader power to control navigable waterways than does the federal government. If this decision is permitted to stand, situations could arise where a state could obstruct navigation for commercial or industrial purposes unrelated to navigation where the federal government could not.

The fundamental issue in the case, however, does not depend upon technical interpretations of rights of access or of the scope of the navigational servitude. The basic problem is the extent to which the courts will stand as a bulwark against the taking of private property by the executive branches of the government without compensation. As the California Supreme Court itself has stated:

> "The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking." (*Clement v. State Reclamation Board,* 35 Cal. 2d 628 at p. 642, 226 P. 2d 897.)

There is no conflict in the facts but what these two well established shipyards will be destroyed without compensation. The mere statement of this fact illustrates the injustice of the decision under review. This impact upon the Petitioners is for the public good in general, but it falls entirely upon the Petitioners alone.

No specter is raised of the accrual of numerous claims for compensation where a bridge is constructed across a busy artery of navigation. Congress has delegated the authority to the Secretary of the Army to make the determination of bridge heights across navigable waterways. This provides a screening process whereby the demands of public navigation are weighed against the cost of a higher bridge. If public navigation is substantial, this preliminary screening will result in the requirement of a bridge of a type that will conform with the needs of such navigation. Where the restrictive effect of a low bridge, however, falls only upon a few the Secretary may determine that the lower bridge is in the greater public interest. In such a situation, there is no machinery in the legislation which would permit the Secretary to either advise, or fix, compensation for the private members of the public whose property is damaged by the restrictive construction.

By a unanimous decision, the Court of Appeal of the State of California for the Third Appellate District recognized this fundamental problem requiring just compensation in the case at bar. (See Appendix A, Exhibit (2), pages 12-14.) There it was stated:

> "Viewed in the light of the economic balancing criterion, the present injuries are sharply focused on two properties. They arouse no concern for the public purse beyond that involved in any eminent domain proceeding. While shared with the general public, marine passage along Upper Stockton Channel without a height restriction is a unique economic attribute of two

commercial shipyards located on a marine cul-de-sac. The prospect of damage claims from the two owners is not so monumental as to discourage the freeway project of which the bridges are a part. The taxpayers can absorb the cost with far less hardship than the owners. (Albers v. County of Los Angeles, supra, 62 Cal. 2d at p. 263.)

The selection between a low level bridge and reasonable alternatives is essentially a budgetary and planning choice by the administrator. Potential damage to the littoral owners may approach the cost of raising the bridge level. At that point the administrator starts thinking of an acceptable alternative, for example, a higher bridge. Intangible community values imperiled by the extended ramps of a high bridge may impel his return to the low level design. Whatever motivates the administrator to choose a low level bridge, dollars or intangible community values, the individual property owner 'if uncompensated would contribute more than his proper share to the public undertaking.' (Clement v. State Reclamation Board, supra, 35 Cal. 2d at p. 642).

The specter of widespread damage claims caused by a bridge athwart a busy artery of marine commerce arouses no policy tremors. Potential economic injuries from obstructions to navigation are limited by federal statutes investing the Chief of Engineers and the Secretary of the Army with discretionary permit powers in the interest of protecting navigation. (See 33 U.S.C. Sec. 401, 403; Ryan v. Chicago, B. & Q. R. Co., 59 F. 2d 137, 142.) Unless the federal officials

> abdicate their responsibilities, a low level, drawless bridge across the Carquinez Straits or the mouth of the Mississippi is a theoretical but not practical possibility. It is reasonable to suggest that the present bridge project merited a federal permit only because the 45-foot limitation on navigation had narrow economic impact on two shipyards located on a marine cul-de-sac; that at some point potential injury to additional maritime interests would provoke denial of a federal permit. Injury claims remaining after the federal screening must then pass a second screening, that imposed by the economic balancing test, which measures the limit of compensability under the California Constitution. Finally, the claim must pass the substantial impairment test. These successive filters prevent compensable injuries to navigation so widely diffused that they are more public than private."

Of interest is the fact that the three justices of the California Court of Appeal unanimously determined that the damage to the Petitioners was compensable. With them two justices of the California Supreme Court agreed. (See Dissenting Opinion, Appendix A, Exhibit (4).) The majority of five justices of the California Supreme Court disagreed, and determined that no compensation could be paid to Petitioners. This illustrates the difficulty of determining the issues involved in the case at bar and also the public policy problems that are presented.

It is the Petitioners' conception that the due process clause of the Fourteenth Amendment to the United States Constitution includes within its

guarantees the fundamental right set forth in both the federal and state constitutions that private property shall not be taken without just compensation.

For this primary reason we seek to invoke this Honorable Court's jurisdiction and pray that the writ issue. The problem presented in the instant case has far-reaching implications both to governmental entities and private persons where highway bridges are required as a part of the national expansion of highways.

It is important to determine whether or not there are any private property rights which can be affected by the curtailment of navigation by bridge construction.

It is also of great importance to determine if the majority of the California Supreme Court is correct in holding that the State of California has a broader power to control navigable waterways than does the federal government. If this decision is permitted to stand, situations could arise where a state could obstruct navigation for commercial purposes unrelated to waterborne commerce, where the federal government could not.

CONCLUSION

The case has been extensively briefed in the state courts and the Petitioners will not restate the extensive arguments here which will be included in the certified record of the California Supreme Court on file. However, the effect of the state court's decision is as follows:

1. To deprive Petitioners of the land and property rights without compensation in violation of the guarantees of the Fourteenth Amendment to the United States Constitution.

2. To deprive Petitioners of procedural due process under the Fourteenth Amendment to the United States Constitution by taking judicial notice of the fact that the submerged lands involved were owned by the State of California, where in fact they were not, and the issue of their ownership was not in evidence in the case.

3. To extend erroneously the rights of a state government under the navigation servitude by declaring that the federal government is limited to projects which improve or regulate navigation, but determining that a state may obstruct navigable waterways for purposes which are entirely unrelated to navigation.

Wherefore, Petitioners pray that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of California.

Dated, December 11, 1967.

Respectfully submitted,
RICHARD BURTON DALEY,
Attorney for Petitioners.

VAN DYKE & SHAW,
DALEY, PATRIDGE & GARRETT,
Counsel for Petitioners in the Courts of the State of California.

(Appendices Follow)

Appendix A

Exhibit (1)

Superior Court
State of California
County of San Jouquin

No. 83,738

Colberg, Inc., a California corporation, et al.,
Plaintiffs,
vs.
The State of California, by and through its agencies, The Department Of Public Works, and The Division of Highways,
Defendant.

JUDGMENT ON THE PLEADINGS

The above-entitled matter came on regularly for hearing on April 20, 1965, at 9:00 a.m., Richard B. Daley appearing as counsel for plaintiffs Colberg, Inc., a California Corporation, Wilton Colberg, Jack Colberg and Gordon Colberg, co-partners, doing business as Colberg Boat Works; James C. Van Dyke appearing as counsel for plaintiff Stephens Marine,

Inc., a California Corporation, in consolidated action No. 83974; and Marc Sandstrom appearing as counsel for the defendant State of California. The Court having heard the argument and examined the briefs of the respective parties, and upon the Findings of Fact and Conclusions of Law on file herein, and Good Cause Appearing Therefor:

It Is Ordered And Adjudged that Defendant State of California's Motion for Judgment on the Pleadings be granted and that judgment be entered in favor of the defendant State of California as against the plaintiffs Colberg, Inc., Wilton Colberg, Jack Colberg and Gordon Colberg, and that said plaintiffs take nothing by their complaint.

It Is Further Ordered And Adjudged that said defendant is entitled to its costs of suit in the amount of _____.

Dated: May 24, 1965.

/s/ Wm. Biddick, Jr.
Wm. Biddick, Jr.
Judge of the Superior Court.

Appendix A, Exhibit (2)

Court of Appeal
State of California
Third Appellate District
[San Joaquin]

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3 Civil No. 11,259

Colberg, Inc., a California corporation; Wilton Colberg, Jack Colberg and Gordon Colberg, copartners, doing business as Colberg Boat Works,
Plaintiffs and Appellants,
vs.
The State of California etc.,
Defendant and Respondent.

Stephens Marine, Inc., a California corporation,
Plaintiff and Appellant,
vs.
The State Of California etc.,
Defendant and Respondent.

OPINION

This declaratory relief action poses the question whether shipyard owners are entitled to eminent

domain damages caused by the erection of a low-level, state highway bridge across a navigable waterway, curtailing ship access to their yards.

The appeal embraces two consolidated actions. For 60 years or more plaintiffs Colberg, Inc., and Stephens Marine, Inc., have conducted neighboring shipyards in the City of Stockton, building and repairing ships, yachts and small boats. The Colberg yard occupies about 8 acres, the Stephens yard about 6. Both yards are situated on the Upper Stockton Channel, a natural, navigable waterway extending easterly from the turning basin of the Port of Stockton. The channel comes to a dead end about 5,000 feet east of the turning basin. Oceangoing and smaller vessels use the Upper Stockton Channel to pass between plaintiffs' yards and the turning basin, from which they may navigate to the sea by way of the Stockton Deep Water Channel, Carquinez Straits and San Francisco Bay. Both yards are improved with marine ways, buildings, docks and allied facilities. Both are riparian to the Upper Stockton Channel.

The State Division of Highways proposes to construct twin freeway bridges across the Upper Stockton Channel, between plaintiffs' shipyards and the turning basin. These will be stationary bridges with a vertical clearance of 45 feet above water level. In conformity with federal law the state applied for and received a permit from the Secretary of the Army and the Chief of the Corps of Engineers, specifying the 45-foot clearance. The bridge will prevent ships

over 45 feet in height from passing through the channel to plaintiffs' yards. Colberg alleges that 81 percent of its current business involves ships which will be unable to reach its yard after the bridges are installed. Stephens declares that curtailment of marine access to its yard will cost it 35 percent of its business. Both declare that the impairment of access will substantially diminish the value of their yards. The present height restriction between these shipyards and the world's oceans is 135 feet, established by the twin bridges of Interstate Highway 80 over the Carquinez Straits.

At oral argument counsel for the State Division of Highways explained that a bridge high enough to accommodate plaintiffs' shipyard traffic would require elevated and extended approaches through the heart of the City of Stockton, producing a variety of adverse effects; that draw or swing bridges are unsuitable for a freeway. Such conditions necessitated selection of the low level, stationary bridge design.

The trial court held that financial injury caused by the bridge project would not be compensable as a taking or damaging of private property under the eminent domain provisions of the California Constitution;[1] that construction of these interstate freeway bridges pursuant to a federal permit is an

[1]Article I, section 14, of the State Constitution declares: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. . . ." Article XV, section 1, of the State Constitution provides: "The right of eminent domain is hereby declared to exist in the State to all frontages on the navigable waters of this State."

exercise of the State's inherent power to control the use of its navigable waters. Accordingly, it ordered entry of judgments on the pleadings in favor of the State. The shipyard owners appeal.

The parties apparently agree that adjudication of the compensability question should not await conventional condemnation or inverse damage suits. The complaints declare that the shipyard owners have substantial investments in their yards; that damage litigation after construction of the bridge project will occupy much time, during which their business operations will be cut back or cut off; that a declaratory judgment establishing compensability will enable them to relocate their respective operations with a minimum interruption of business; that the state rejects the plaintiffs' claim of compensability under existing eminent domain law. These conditions make declaratory relief appropriate.

The appeal presents two major questions: First, since the state proposes no physical taking of private lands but only an offsite obstruction to access by water, is there a taking or damaging of private property within the scope of article I, section 14, of the California Constitution? Second, is the state acting under its sovereign power over navigable water, a power to which private water rights are usually subordinate?

Initially, a line must be drawn between two kinds of rights enjoyed by the owner of property abutting on public, navigable water. One is the right of access from the upland to his own waterfront, a private

right.[2] The other is the right of navigation, a right which—generally speaking—the owner shares with the public. We are here concerned with a physical impairment of the latter right, not the former. Article I, section 14, of the California Constitution declares compensability for the taking or damaging of "private property" only. If, as many of the authorities hold, the littoral owner's right of navigation is purely public and not at all private, he has no compensable interest, though he suffers economic loss from the obstruction to navigation.

According to the weight of authority, a littoral owner's right to navigate between his land and the world's oceans is not a private right, but one which he shares with the general public; hence he has no constitutional right of eminent domain compensation when a downstream bridge "without draws" cuts him off from the outside world.[3] The holding is consistent with cases denying the upstream owner injunctive relief against the obstruction of navigation by a

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[2]See, for example, United States v. River Rouge Improvement Co., 269 U.S. 411, 418; San Francisco Savings Union v. R. G. R. Petroleum Co., 144 Cal. 134, 137-139; Shirley v. Bishop, 67 Cal. 543. The "private" right of access to the waterfront may nevertheless be subordinate to the public easement of navigation, hence not compensable in eminent domain. (Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 466-468; City of Newport Beach v. Fager, 39 Cal.App.2d 23, 28; 2 Nichols on Eminent Domain (3d ed.) 258-260.

[3]Moore v. State Road Dept. (Fla.) 171 So.2d 25; Carmazi v. Board of County Com'rs. of Dade Co. (Fla.) 108 So.2d 318; Marine Air Ways v. State, 104 N.Y.Supp.2d 964, affd. 116 N.Y. Supp.2d 778; State v. Masheter (Ohio) 203 N.E.2d 325; 2 Nichols, *op. cit.*, p. 264, cases cited at fn. 16.

downstream bridge built in compliance with public laws controlling navigability.[4]

The rule against compensation for interferences with navigation is just as fixed or malleable as the concept of private property embodied in the eminent domain provision of a state's constitution. Mr. Justice Jackson once warned: "But that a closed catalogue of abstract and absolute 'property rights' in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a 'property right;' whether it is a property right is really the question to be answered." (United States v. Willow River Power Co., 324 U.S. 499, 502-503.)

The amendment of state constitutions, including California's, to provide compensation when private property is "damaged" as well as "taken" for public use, indicates an intent to expand the area of compensability, requiring the courts to fix its limits by placing the economic interests of the public in balance against the sacrifices imposed on the landowner. (Bacich v. Board of Control, 23 Cal.2d 343, 350-351; concurring opinion of Edmonds, J. *ibid.*, pp. 358-360; see Albers v. County of Los Angeles, 62 Cal.2d 250, 262-263.) The case-by-case balancing of these compet-

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[4]Gilman v. Philadelphia, 3 Wall. 713 [18 L.Ed. 96]; Miller v. City of New York, 109 U.S. 385; Cardwell v. American River Bridge Co., 113 U.S. 205; Pacific Inter-Club Yacht Assn. v. Morris, 197 F. Supp. 218; Jarvis v. Santa Clara Valley R.R. Co., 52 Cal. 438; People v. Potrero and Bay View P. R. Co., 67 Cal. 166; cf. Hickok et al. v. Hine, 23 Ohio St. 523; see also Sound Marine & Machine Corp. v. Westchester Co., 100 F.2d 360.

ing interests results in judicial expansion or contraction of a group of intangible rights recognized as compensable "private property." Compensable property, it is now recognized, includes not only the physical land and improvements but certain intangible rights of access between the land and the outside world. Thus, although the owner uses the streets in common with the rest of the public, he owns a private easement of access which consists of the right to get into the street abutting his property and thence to the general system of public streets and highways. (Valenta v. County of Los Angeles, 61 Cal.2d 669, 671; Breidert v. Southern Pac. Co., 61 Cal.2d 659, 663; citing preceding California decisions; cf. Sneed v. County of Riverside, 218 Cal.App.2d 205, re airspace invasion.) Not every impairment of access to the general system of public streets is compensable in eminent domain. Compensability, rather, requires an individualized finding of substantial impairment, a finding of fact delegated to the trial court and not the jury. (Breidert v. Southern Pac. Co., supra, 61 Cal.2d at pp. 663-665; People v. Ricciardi, 23 Cal.2d 390, 402-403.)

The central problem is to locate a line between compensable damage to private property and disadvantages of the kind called "consequential." Of the latter sort are such elements as loss of business and diminution of traffic caused by diversion of traffic and circuitry of travel. (People v. Symons, 54 Cal.2d 855, 860.) Applying the economic balancing test, the Supreme Court points out that awards of the latter sort

would severely burden the public treasury and produce "'an embargo upon the creation of new and desirable roads.'" *(Ibid.,* p. 862.)

The street access doctrine represents an expanded notion of the constitutional concept of private property whose invasion or damage is compensable in eminent domain. It means that "property" in an eminent domain sense includes not only a piece of the earth's surface but an intangible right of movement between it and the outside world; that, although the channels of movement are shared with the public, they are "private" and compensable when a public improvement devalues a particular piece of land by substantially impairing these channels. Navigable waterways are channels of movement no less than streets and highways. (See Chicago etc. Ry. v. City of Minneapolis, 232 U.S. 430, 442; Wattson v. Eldridge, 207 Cal. 314, 320; People v. Gold Run D. & M. Co., 66 Cal. 138, 147.) There is no difference in principle or policy between land and sea access which affirms an easement of access by land and denies it by water. If a public project obstructs the owner's access to the outside world, he is equally hurt whether the barrier blocks him by land or by sea. A littoral property owner's easement of access includes both media of movement.

Claims for loss of street access often arise because the public improvement places private property on a cul-de-sac, restricting accessibility to one direction only, e.g., Valenta v. County of Los Angeles, supra; Bacich v. Board of Control, supra. The Colberg and

Stephens shipyards are situated on a natural cul-de-sac. Without the intervention of the public improvement, they have marine access to the outside world in one direction only. According to the complaints, construction of the public project will obstruct much of the single marine route between their property and the outside world. Their private right of access to the navigable water in front of their property has little value if that is as far as they can go.[5] Location on a partially blocked, marine cul-de-sac is one element in the group of circumstances indicating the occurrence or absence of a substantial impairment of the easement of access.

Doubtless these shipyards have street access on the landward side. Shoreline properties have obvious economic attributes resulting from their accessibility by water. Residual access by land may supply scant economic solace when marine access beyond the immediate waterfront is obstructed or destroyed. The substantial impairment rule supplies a criterion for determining whether the retention of land access and the destruction or obstruction of marine access result in compensable damage.

The state contends that the street access doctrine is only an analogy. It suggests that the public policy of the street access cases, where economic balancing is possible, does not apply to loss of marine access;

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[5]At this point we paraphrase the majority opinion in Bacich v. Board of Control, supra (23 Cal.2d at p. 354) which states: "To be able to get onto the street immediately in front of the property is of little value if that is as far as [the owner] can go."

that the public can supply economical alternative routes to compensate for closed streets but not for closed waterways; further, that a bridge of limited clearance across a busy waterway may elicit damage claims so heavy and widespread as to prevent the project. These factors evoke no policy considerations excluding access by water from the general easement of access recognized in eminent domain. The balancing approach is much broader than the street access cases. It is employed to measure the reach of the policy underlying the eminent domain provision of the State Constitution, laying down a line which separates compensable injuries from noncompensable disadvantages. In Albers v. County of Los Angeles, supra, it is used in the context of a landslide damage claim; in Clement v. State Reclamation Board, 35 Cal.2d 628, 642, to determine compensability of flood damage. In the course of the latter decision the court states: "The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking." (Clement v. State Reclamation Board, supra, 35 Cal.2d at p. 642.)

Viewed in the light of the economic balancing criterion, the present injuries are sharply focused on two properties. They arouse no concern for the public purse beyond that involved in any eminent domain proceeding. While shared with the general public, marine passage along Upper Stockton Channel without a height restriction is a unique economic attribute of two commercial shipyards located on a marine cul-

de-sac.[6] The prospect of damage claims from the two owners is not so monumental as to discourage the freeway project of which the bridges are a part. The taxpayers can absorb the cost with far less hardship than the owners. (Albers v. County of Los Angeles, supra, 62 Cal.2d at p. 263.)

The selection between a low level bridge and reasonable alternatives is essentially a budgetary and planning choice by the administrator. Potential damage to the littoral owners may approach the cost of raising the bridge level. At that point the administrator starts thinking of an acceptable alternative, for example, a higher bridge. Intangible community values imperiled by the extended ramps of a high bridge may impel his return to the low level design. Whatever motivates the administrator to choose a low level bridge, dollars or intangible community values, the individual property owner "if uncompensated would contribute more than his proper share to the public undertaking." (Clement v. State Reclamation Board, supra, 35 Cal.2d at p. 642.)

The specter of widespread damage claims caused by a bridge athwart a busy artery of marine commerce arouses no policy tremors. Potential economic injuries from obstructions to navigation are limited by federal statutes investing the Chief of Engineers and the Secretary of the Army with discretionary permit powers in the interest of protecting navigation. (See

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[6]At this point we refrain from anticipating the computation of damage and from indicating the relationship between loss of business and devaluation of property.

33 U.S.C. §§ 401, 403; Ryan v. Chicago, B. & Q. R. Co., 59 F.2d 137, 142.) Unless the federal officials abdicate their responsibilities, a low level, drawless bridge across the Carquinez Straits or the mouth of the Mississippi is a theoretical but not practical possibility. It is reasonable to suggest that the present bridge project merited a federal permit only because the 45-foot limitation on navigation had narrow economic impact on two shipyards located on a marine cul-de-sac; that at some point potential injury to additional maritime interests would provoke denial of a federal permit. Injury claims remaining after the federal screening must then pass a second screening, that imposed by the economic balancing test, which measures the limit of compensability under the California Constitution. Finally, the claim must pass the substantial impairment test. These successive filters prevent compensable injuries to navigation so widely diffused that they are more public than private.

We resist the invitation to follow the nuisance and equity decisions which deny upstream owners relief against downstream bridges which obstruct navigation. (See cases cited fn. 4, supra.) Such decisions turn largely on the "public" character of the right of navigation and the private plaintiff's lack of standing to seek relief against a public nuisance not peculiar to himself. In the search for an eminent domain concept of "private property," equity and nuisance decisions are not a trustworthy guide (see Clement v. State Reclamation Board, supra, 35 Cal.2d at p. 641). Preferable to analogies drawn from other branches

of the law is the self-contained "easement of access" doctrine developed as part of the California law of eminent domain.

Eminent domain decisions in other states on compensability of obstructions to navigation vary. The variation is often prompted by the language of the particular state's constitutional provision. In Pennsylvania, where the constitution was amended to provide compensation for property "injured" as well as taken, a wharf owner was awarded damages when a city bridge prevented vessels from passing upstream to his wharf. (In re Construction of Walnut St. Bridge, 191 Pa. 153, reported *sub. nom.* Gumbes v. City of Philadelphia, 43 A. 88.) In State v. Masheter, supra, where the Ohio constitution limited compensation to a "taking," the court denied recovery under similar facts. One of the Ohio judges dissented, believing that the riparian terminal operator had developed a private right of navigation which was separate from that of the public and was "taken" from him by the bridge.[7] In New York a similar claim was denied on the theory (imported from the equity and nuisance decisions) that the right of navigation is "exclusively a public right." (Marine Air Ways v. State, supra, 104 N.Y.Supp.2d at p. 967, affd. 116 N.Y.Supp.2d 778.) The Florida courts have adopted the same rationale. (Moore v. State Road Dept., supra (Fla.) 171 So.2d 25; Carmazi v. Board of County Com'rs of Dade Co., supra, 108 So.2d 318.)

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[7]Cf. Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170, 183, dissent of Carter, J.

None of these decisions considered the easement of access doctrine evolved as part of the California law of eminent domain. None of them considered the balancing of policies implicit in the easement of access doctrine.

Both sides seek support in City of Los Angeles v. Aitken, 10 Cal.App.2d 460. The action was one to condemn littoral rights on a navigable lake whose level would be lowered by the condemning agency's diversion of tributary streams. The defendant owned shoreline resort property. According to the opinion, the marginal owner's privilege of boating was not itself compensable, but constituted an element in the valuation of his shoreline property. The case supplies no precedent here, since it involves a destruction of the littoral owner's private right of access to navigable water directly fronting on his property.

The second major question is posed by the doctrine denying compensation when a littoral owner's interests in navigable water are damaged through the exercise of the "navigation servitude," that is, through the public's paramount power to control navigable waters in the interest of navigation and commerce. (See generally Miramar Co. v. City of Santa Barbara, supra, 23 Cal.2d 170; 2 Nichols, *op. cit.*, pp. 247-258.) The state relies upon cases which seemingly extend the doctrine to public improvements which aid commerce as well as those aiding navigation. (Henry Dalton & Sons Co. v. Oakland, supra, 168 Cal. 463, 467; City of Newport Beach v. Fager, supra, 39 Cal. App.2d at p. 28.) It points out that the proposed

bridges are part of an interstate freeway project which will improve access to Stockton harbor and benefit land and water transportation.

Broad dicta in some of the decisions permit identification of the navigation servitude with the promotion of "commerce" without express restriction to waterborne commerce. Such statements should not be taken out of context. Decisional law rejects the notion that any project facilitating commerce is *ipso facto* within the sovereign power over waterways. Nor do the parallel powers of the federal and state governments over navigation include every public project affecting the navigable capacity of water. Although most generalizations entail some peril, the general tenor of the decisions is that the navigation servitude is limited to public works designed to aid or control navigation, excluding projects for other purposes.[8] A leading case refers to the navigation servitude as one embracing "such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation." (Scranton v. Wheeler, 179 U.S. 141, 163.) Freeways and streets along the waterfront are outside the scope of the navigation servitude (In re City of New York, 61 N.E. 158; In re Jamica Bay in City of New York etc., 176 N.E. 539; Crance v. State, supra, 128 N.Y.

[8]United States v. River Rouge Imp. Co., supra, 269 U.S. at p. 419; United States v. 50 Foot Right of Way in Bayonne, N.J., 337 F.2d 956, 959; United States v. 412.715 Acres of Land etc., 53 F. Supp. 143, 149; City of Los Angeles v. Aitken, supra, 10 Cal.App. 2d at p. 470; Crance v. State, 128 N.Y.Supp.2d 479, 481, reversed on other grounds 128 N.E.2d 324; 26 Am.Jur.2d, Eminent Domain, § 191, p. 870; Note: 18 A.L.R. 403.

Supp.2d 479) although there is contrary authority (Crary v. State Highway Comm. (Miss.) 68 So.2d 468). Deepening the channel of a stream to prevent overflows harmful to roads and bridges is not an exercise of the navigation power. (Conger v. Pierce Co. (Wash.) 198 Pac. 377 [18 A.L.R. 393].) The proposed freeway bridges across the Upper Stockton Channel will not aid its development as a medium of commerce. Rather they will obstruct its navigability, albeit the obstruction will be sanctioned by federal law. (See Southlands Co. v. City of San Diego, 211 Cal. 646.)

The state seeks to extend the navigation servitude on the strength of decisions permitting improvements on publicly owned tidelands without compensation for the upland owner's loss of access, e.g., Miramar Co. v. City of Santa Barbara, supra, 23 Cal.2d 170; Henry Dalton & Sons Co. v. Oakland, supra, 168 Cal. 463; City of Newport Beach v. Fager, supra, 39 Cal. App.2d 23. In those cases the public's immunity is said to extend not only to tideland projects promoting navigation but to any "lawful use or purpose." (People v. Hecker, 179 Cal.App.2d 823, 840; City of Newport Beach v. Fager, supra, 39 Cal.App.2d at p. 28.) The tideland cases turn upon the principle that the littoral rights of an owner whose land adjoins publicly owned tidelands may be terminated by whatever disposition of the tidelands the public chooses to make. (Miramar Co. v. City of Santa Barbara, supra, 23 Cal.2d at p. 174.) Although public tidelands are held in trust for commerce, navigation and fishery,

projects on tidelands may have nothing to do with navigation. Subject to the restrictions in statutory grants, public tidelands may be devoted to any use which does not prejudice the public rights of navigation and fishing. (Mallon v. City of Long Beach, 44 Cal.2d 199, 206; Boone v. Kingsbury, 206 Cal. 148, 183, 189.) Thus the public's power to improve its tidelands without compensating littoral owners is not a measure of the navigation servitude when tideland use is not involved.

Finally, the state urges that the federal permit to construct the low level bridge project across Upper Stockton Channel is "conclusive." Perhaps it is, in the limited sense that a court may not restrain an obstruction to navigation permitted by federal law. (See cases cited fn. 4, supra.) The permit is only a declaration of federal assent, not a delegation of power.[9] Federal assent to the project does not shield the state from the eminent domain provision of its own constitution. "It must be remembered . . . that damage may be inflicted within the meaning of such a constitutional provision by the mere exercise of unquestioned public rights." (2 Nichols, *op. cit.*, p. 265.)

We conclude that the bridge project is not an exercise of the state's navigation servitude; that the project will cause compensable damage to plaintiffs' private properties if, in an appropriate proceeding,

[9]Cummings v. City of Chicago, 188 U.S. 410, 430-431; Pembroke v. Peninsular Terminal Co. (Fla.) 146 So. 249, 255; Cobb v. Lincoln Park Com'rs. (Ill.) 67 N.E. 5, 9; Wilson v. Hudson County Water Co. (N.J.) 76 A. 560, 565-566; Sullivan v. Booth & Flinn, 206 N.Y.Supp. 360, 363.)

a court finds substantial impairment of their respective easements of access. The judgments are reversed and the proceedings remanded with directions to enter declaratory judgments consistent with this opinion.

Friedman, J.

We concur:

Pierce, P. J.

Regan, J.

Filed December 1, 1966,
Wilfried J. Kramer, Clerk.

Appendix A, Exhibit (3)

In the Supreme Court of the State of California

[IN BANK]

Sac. 7694

Colberg, Inc., et al.,
Plaintiffs and Appellants,
vs.
State of California ex rel. Department of Public Works,
Defendant and Respondent.

Stephens Marine, Inc.,
Plaintiff and Appellant,
vs.
State of California ex rel. Department of Public Works,
Defendant and Respondent.

MAJORITY OPINION

[SEE DISSENTING OPINION]

These consolidated actions[1] for declaratory relief present the common issue whether plaintiff shipyard owners will have any causes of action for damages under the law of eminent domain arising out of the im-

[1]The trial court granted defendant's motion for consolidation of both actions "for hearing and trial." Appellants have prepared a single record on appeal but filed separate briefs.

pairment of their access to the Stockton Deep Water Ship Channel as a result of the construction of two proposed fixed low level parallel bridges spanning a connecting navigable waterway to which their properties are riparian. Separate judgments on the pleadings in favor of defendant State of California were entered below and all plaintiffs have appealed.

The record discloses that although the judgments were entered upon an order granting separate motions for judgment on the pleadings, defendant filed no answer in either case. Its motion therefore had the purpose and effect of a general demurrer (2 Witkin, Cal. Procedure, p. 1706) and on review is to be tested by the same rules. (Dragna v. White (1955) 45 Cal. 2d 469, 470; Chas. L. Harney, Inc. v. Contractors' Bd. (1952) 39 Cal.2d 561, 565.) Since the motion was used to perform the function of a general demurrer, it "reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice" (Weil v. Barthel (1955) 45 Cal.2d 835, 837) and "admits all material and issuable facts pleaded." (Flores v. Arroyo (1961) 56 Cal.2d 492, 497.) We proceed to set forth the facts in the light of these principles.[2]

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[2]In each action the court made and filed findings of fact and conclusions of law. Since the granting of each motion had the effect of an order sustaining a general demurrer and since there was no "trial of a question of fact by the court" (Code Civ. Proc., § 632), there was nothing to find. The findings of fact and conclusions of law were not required and we have disregarded them. (Taylor v. Palmer (1866) 31 Cal. 240, 257; Bradley Co. v. Ridgeway (1936) 14 Cal.App.2d 326, 330; see also Flynn v. Flynn (1951) 103 Cal.App.2d 91, 96-97; Lunsford v. Kosanke (1956) 140 Cal.App.2d 623, 631-632.)

The Stockton Deep Water Ship Channel is a navigable tidal waterway extending from the mouth of the San Joaquin River to the Port of Stockton. From the turning basin adjoining the port, the channel continues easterly for about 5,000 feet and comes to a dead end within the confines of the city. This portion of the waterway is known as the Upper Stockton Channel. Plaintiffs Colberg[3] and Stephens Marine, Inc. (Stephens), own real property in the City of Stockton riparian to the Upper Stockton Channel upon which for more than sixty years they have conducted shipyards for the construction and repair of yachts and ocean-going vessels. Both yards are improved with marineways, buildings, docks and allied facilities. Colberg's property consists of approximately eight acres; Stephens' of approximately six. Ships and other craft now using the Upper Stockton Channel can proceed to the turning basin and the Stockton Deep Water Ship Channel and thereupon navigate to the open sea by way of the Carquinez Straits and San Francisco Bay.

The state proposes to construct twin stationary freeway bridges across the Upper Stockton Channel between plaintiffs' properties and the turning basin. The vertical clearance of these bridges is to be, generally speaking, 45 feet above the water line. Pur-

[3]In the Colberg action plaintiffs are Colberg, Inc., a California corporation, Wilton Colberg, Jack Colberg and Gordon Colberg, co-partners, doing business as Colberg Boat Works. Colberg, Inc. operates the shipyard under a lease from the partnership and owns the equipment and personal property utilized in such operation. Hereafter, unless otherwise indicated, we refer to all of the said plaintiffs collectively as Colberg.

suant to federal law the state applied to the Secretary of the Army and the Chief of Engineers for a permit to build such bridges. (See 33 U.S.C.A. § 525, subd. (b).) After a public hearing, consideration of the views of various interested persons including these plaintiffs, and an extensive economic survey, approval of the location and plans of the bridges was granted by federal authorities in February 1964, subject to conditions not here necessary to be detailed.

Colberg alleges that 81 percent of its current business involves ships standing more than 45 feet above the water line. Plaintiff Stephens alleges that 35 percent of its current business involves such ships. The present minimum clearance between plaintiffs' yards and the Pacific Ocean is 135 feet, established by the Antioch Bridge. Plaintiffs allege in substance that after the construction of the proposed bridges, no vessel with fixed structure in excess of 45 feet above the water line will be able to enter their respective shipyards; that there is no other access by water to the yards from the San Joaquin River, San Francisco Bay and the oceans of the world; and that plaintiffs, their properties and their businesses will suffer loss and damages because of the impairment of access resulting from the construction of the bridges.[4] Plaintiffs in both actions alleged that an

[4]Colberg alleges that its property "will be totally lost and destroyed"; and that it is "the only shipyard facility which lies on the Upper Stockton Channel that relies principally upon the repair and construction of large vessels for its income." Stephens alleges that as a result of the construction of the bridges, its shipyard "can only be operated at substantial loss to the plaintiff and the value of plaintiff's property will be substantially diminished"

actual controversy exists (see Code Civ. Proc., § 1060) between each of them and the state as to whether the alleged impairment of access to "the main channel of the San Joaquin River" is compensable.

Counsel for the state pointed out to us at oral argument that a bridge of vertical clearance sufficient to accommodate plaintiffs' shipyard traffic would involve greatly increased construction costs because it would entail extended approaches;[5] that the added height of such approaches would have an adverse effect upon intangible community values; and that a draw or swing bridge would be unsuitable for freeway purposes.

The trial court granted the state's motion for judgment on the pleadings in both cases and entered judgments accordingly. In its memorandum opinion it held that diminution of the scope of plaintiffs' access from their respective properties to the Stockton Deep Water Ship Channel as a result of the state's proposed action relative to its navigable waters

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[5]Colberg alleges on information and belief that the state "has determined the comparative costs of the bridges at different levels, including structure, roadway, and right of way acquisitions to be as follows:

"50 foot vertical clearance above mean sea level: $27,448,000.00
"63 foot vertical clearance above mean sea level: $38,724,000.00
"100 foot vertical clearance above mean sea level: $46,398,000.00
"No estimate of cost has been made by the defendant for a bridge 135 feet above mean sea level"; further alleges that "the determination of the defendant to construct said bridges with a vertical clearance of 50 feet above mean sea level, and to construct them without facilities for a lift type or draw-bridge type bridge, has been made solely upon considerations of economy and the advantages to motor vehicle traffic safety and utility, and not upon any consideration to improve navigation. Plaintiffs further allege that said bridges are an obstruction to navigation and do not improve navigation in any manner whatsoever."

would not constitute a taking or damaging of private property for which just compensation would be required.

It is not disputed that an actual controversy exists between the parties on this question; that if plaintiffs were required to await construction of the bridge before commencing an action at law, they would suffer irreparable damage because of interference with their businesses during construction; that a declaratory judgment resolving the question of compensability in their favor prior to completion of the bridge project will permit relocation of their respective operations with a minimum of inconvenience; and that plaintiffs will be unable to plan their businesses or enter into necessary long-term business contracts, until such question is settled. We are satisfied that under the above circumstances plaintiffs were entitled to invoke declaratory relief.[6]

The sole question in this case is whether the alleged impairment of plaintiffs' access to the Stockton Deep Water Ship Channel constitutes a taking or damaging of private property within the meaning of article

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[6]"The demands of commerce and of modern life generally impose a necessity for security in legal relations. That implies not only that the immediate present be stabilized, but that planning for the future may be possible. Such planning requires the opportunity to ascertain and to determine the effect of relations and events certain or practically certain to arise in the future." (Borchard, Declaratory Judgments (2d ed. 1941) pp. 414-415; see Sattinger v. Newbauer (1954) 123 Cal.App.2d 365, 367; Staley v. Board of Medical Examiners (1952) 109 Cal.App.2d 1, 5-6; Knox v. Wolfe (1946) 73 Cal.App.2d 494, 505; University of Redlands v. Ford (1942) 56 Cal.App.2d 151, 153.)

I, section 14 of the California Constitution.[7] In order to answer this question we are led to an examination of the interest of the state in its navigable waters; in the course of this examination we explain the relationship between the state's power to deal with its navigable waters and the extent of its constitutional duty to make compensation for damage caused by the exercise of that power.

In order to put the controversy into proper focus, we must first make some preliminary observations concerning plaintiffs' position and the nature and extent of their claim. First, it is clear that plaintiffs must assert the taking or damaging of a *private* right in order to bring themselves within the protective embrace of article I, section 14. Thus, they cannot ground their claim in the right of navigation, for this is a public right from the abridgement of which plaintiffs will suffer no damage different in character from that to be suffered by the general public.[8] (Jarvis v. Santa Clara Val. R.R. Co. (1877) 52 Cal. 438,

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[7]"Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner, . . ." (Cal. Const., art. I, § 14.)

[8]Indeed, plaintiffs, while scrupulously eschewing all claims based on a public right, have been forced into the position of extending a private right in a meandering continuum from their properties to the Pacific Ocean and, as counsel for the state observed at oral argument, now claim a property right in "a column of air 135 feet high extending from their properties to the sea." We cannot refrain from observing that were the bridge here involved proposed for the Carquinez Straits instead of the Upper Stockton Channel, plaintiffs, consistently with the theory of their pleadings, would advance the same basic claim for compensation. If such claim could be considered valid for plaintiffs, it would also be assertible by the countless riparian owners in the intervening section of the watercourse.

440; S. F. Sav. Union v. R.G.R. Petroleum Co. (1904) 144 Cal. 134; 139; Miller v. Mayor of New York (1883) 109 U.S. 385, 394-395; Frost v. Railroad Co. (1901) 96 Me. 76, 85-86; Marine Air Ways v. State of New York (1951) 201 Misc. 349, 350 and cases there cited, affd. 280 App.Div. 1021; 56 Am. Jur., Waters, § 216, pp. 677-678.) Instead, they must have recourse to the private right of an owner riparian to a navigable waterway to have access to the channel. (See S.F. Sav. Union v. R.G.R. Petroleum Co., *supra,* 144 Cal. 134, 139; Shirley v. Bishop (1885) 67 Cal. 543; 56 Am.Jur., Waters, § 216, p. 677.) However, it appears that the access from plaintiffs' property to the navigable portion of the waterway to which they are riparian, to wit, the Upper Stockton Channel, will not be impaired by the proposed project, so that their private right of access, if limited to its traditional scope, will not be "taken or damaged" and no claim for compensation can arise. It is therefore plaintiffs' position that the private right of access must be expanded. They assert that the construction of the bridge in question will render their private right of access useless insofar as it pertains to vessels with a fixed structure more than 45 feet above the waterline; that after such construction they "can launch ships, but they can go nowhere." Action which renders a right valueless, they urge, effectively "takes or damages" that right.

We deem it unnecessary to decide this question, for we have determined that, whatever the scope of plaintiffs' right of riparian access *as against other private*

persons, that right must yield without compensation to a proper exercise of the power *of the state* over its navigable waters. It is to a discussion of this latter power that we now turn.

The State of California holds all of its navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people." (People v. Gold Run D. & M. Co. (1884) 66 Cal. 138, 151; see also Martin v. Waddell (1842) 41 U.S. (16 Pet.) 366, 410; Shively v. Bowlby (1894) 152 U.S. 1, 11-18; Eldridge v. Cowell (1854) 4 Cal. 80, 87; Ward v. Mulford (1867) 32 Cal. 365, 372; People v. California Fish Co. (1913) 166 Cal. 576, 584-585 and cases there cited; Henry Dalton & Sons v. Oakland (1914) 168 Cal. 463, 465, 467-468; City of Long Beach v. Lisenby (1917) 175 Cal. 575, 579; Atwood v. Hammond (1935) 4 Cal.2d 31, 40; Katenkamp v. Union Realty Co. (1936) 6 Cal.2d 765, 769; Miramar Co. v. City of Santa Barbara (1943) 23 Cal.2d 170, 174; see generally 51 Cal.Jur.2d pp. 466-467, 508-509; 56 Am. Jur. pp. 698-699.) Its power to control, regulate and utilize such waters within the terms of the trust is absolute except as limited by the paramount supervisory power of the federal government over navigable waters. (Gray v. Reclamation District No. 1500 (1917) 174 Cal. 622, 637; see Shively v. Bowlby, *supra,* 152 U.S. 1, 26-31; United States v. Mission Rock Co. (1903) 189 U.S. 391, 404.) The nature and extent of the trust under which the state holds its navigable waterways has never been defined with precision, but it has been stated generally that acts of

the state with regard to its navigable waters are within trust purposes when they are done "for purposes of commerce, navigation, and fisheries for the benefit of all the people of the state." (Mallon v. City of Long Beach (1955) 44 Cal.2d 199, 205; see also People v. California Fish Co., *supra,* 166 Cal. 576, 584-585; City of Long Beach v. Lisenby, *supra,* 175 Cal. 575, 579 ("for purposes of navigation and commerce"); City of Long Beach v. Marshall (1938) 11 Cal.2d 609, 614 ("for navigation, commerce and fishing"); City of Newport Beach v. Fager (1940) 39 Cal.App.2d 23, 28; People v. Hecker (1960) 179 Cal. App.2d 823, 840.)

The courts have construed the purposes of the trust with liberality to the end of benefiting all the people of the state. In the early case of People v. P. & B. V. R.R. Co. (1885) 67 Cal. 166, defendant, under authority of a franchise granted by the Legislature, constructed a railroad bridge across Islais Creek, a navigable waterway. The bridge was an obstruction to navigation, and the Board of State Harbor Commissioners sought to have it abated as a nuisance. It was contended that the legislative act granting the right to build the bridge was in conflict with the act of Congress admitting California into the Union, which act provided that " 'all the navigable waters within the State shall be common highways and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor.' " This court rejected this contention, holding *inter alia* that "while the power

of the State with respect to the construction, regulation, and control of bridges . . . is subordinate to that of Congress, still until Congress acts on the subject, the power of the State is plenary." (67 Cal. at p. 168.) Though we there made no explicit reference to the extent of the trust relating to navigable waters, we impliedly held that the spanning of navigable waters by a railroad bridge was an act within the trust purposes of "commerce, navigation, and fisheries."

In Boone v. Kingsbury (1928) 206 Cal. 148, the state surveyor-general had refused to issue to plaintiffs permits to prospect for oil and gas upon tidal lands covered by navigable sea waters upon the ground, *inter alia,* that the granting of such permits would constitute an act without the scope of the trust because such prospecting would not be "in aid and furtherance of commerce and navigation." We rejected that contention, holding that the relationship of gasoline to commerce was manifest. "Gasoline is the power that largely moves the commerce of nations over lands and sea; . . . Gasoline is so closely allied with state and national welfare as to make its production a matter of state and national concern. If it can be said of any industry that its output is 'in aid and furtherance of commerce and navigation,' and its production 'a public benefit,' the production of gasoline, by reason of the motive elements that inhere in it and its universal use and adaptability to varied uses and the convenient and portable form in which it may be confined, would entitle it to a high

classification in the scale of useful, natural products. It is a mover of commerce and fills the office of 'a public benefit.'" (206 Cal. at p. 181.)

Finally, in the case of Gray v. Reclamation District No. 1500, *supra,* 174 Cal. 622, plaintiffs sought to enjoin the operations of defendant district, which was engaged in efforts to reclaim land and prevent flooding, with incidental benefits to navigation, near the confluence of the Sacramento and Feather Rivers. We there rejected plaintiffs' contention that the state had no power to deal with its navigable waters unless its dominant purpose was to improve navigation. "The supreme control of the state over its navigable waters was early declared in *Eldridge v. Cowell,* 4 Cal. 80, approved in *United States v. Mission Rock Co.,* 189 U.S. 391, [47 L.Ed. 865, 23 Sup.Ct.Rep. 606]. This right of control embraces within it not alone the power to destroy the navigability of certain waters for the benefit of others, but extends in the case of streams to the power to regulate and control the navigable or non-navigable tributaries, as in the debris cases, *to the erection of structures along or across the stream,* to deepening or changing the channel, to diverting or arresting tributaries; *in short, to do anything subserving the great purpose, . . .*" (Emphasis added.) (174 Cal. at p. 636.)

We deem it too clear to warrant the citation of further authority that the state, as trustee for the benefit of the people, has power to deal with its navigable waters in any manner consistent with the improvement of commercial intercourse, whether navigational

or otherwise. It is equally clear, however, that the question of governmental *power* is quite different from that of *compensation* for damage caused by the exercise of such power. It is to the latter question that we now turn.

We have referred above to the paramount supervisory power of the federal government over navigable waters. This power, though superior to that of the state, is not grounded in ownership of the navigable waterways upon which it operates, but rather derives from the commerce clause of the United States Constitution, and it has been stated that it may properly be exercised *only* in order to aid navigation. (Port of Seattle v. Oregon & W. R. Co. (1921) 255 U.S. 56, 63; United States v. Kansas City Ins. Co. (1950) 339 U.S. 799, 808; see also United States v. River Rouge Co. (1926) 269 U.S. 411, 419; but see United States v. Twin City Power Co. (1956) 350 U.S. 222; United States v. Commodore Park (1945) 324 U.S. 386, 391-392; United States v. Gerlach Live Stock Co. (1950) 339 U.S. 725; see generally Morreale, *Federal Power in Western Waters* (1963) 3 Nat'l Resources J. 1, 9-19.) The Fifth Amendment to the United States Constitution[9] is of course applicable to the exercise of the federal navigational power within its proper scope, just as article I, section 14 of the state Constitution is applicable to the exercise of state power over navigable waters, but in many cases compensation for "damage" caused by exercise

[9]". . . nor shall private property be taken for public use, without just compensation." (U.S. Const., Amend. V.)

of the federal power is denied because the rights and values affected are deemed to be burdened with the so-called federal "navigation servitude."[10] Among the rights so burdened is that of the access from riparian land to the affected navigable waterway. (Gibson v. United States (1897) 166 U.S. 269; see Transportation Co. v. Chicago (1878) 99 U.S. 635.) The limits of the servitude are reached, however, and just compensation must be paid in spite of the fact that the power has been exercised within its scope, when permanent physical encroachment upon or invasion of land riparian to the navigable waterway but above the ordinary high-water mark results. (See United States v. Chicago, M., St.P. & P.R. Co. (1941) 312 U.S. 592; United States v. Commodore Park, *supra,* 324 U.S. 386, 391; cf. United States v. Kansas City Ins. Co., *supra,* 339 U.S. 799; Pumpelly v. Green Bay Company (1871 80 U.S. (13 Wall.) 166.)

As we have shown above, the power of the State of California to deal with its navigable waters, though subject to the superior federal power, is considerably wider in scope than that paramount power. The state, as owner of its navigable waterways subject to a trust for the benefit of the people, may act relative to those waterways in any manner consistent with the im-

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[10]There is some doubt as to the origin and basis of the dominant navigational servitude in favor of the federal government. Perhaps the most satisfactory explanation is that derived from the common law concept of *jus publicum,* that interest of the Crown in its navigable waterways whereby the subjects were assured that such waterways would be utilized for public benefit, and that private interference with such utilization would be prevented. (See Morreale, *op. cit.,* at pp. 19-31.)

provement of commercial traffic and intercourse. We are of the further view that the law of California burdens property riparian or littoral to navigable waters with a servitude commensurate with the power of the state over such navigable waters, and that "when the act [of the state] is done, if it does not embrace the actual taking of property, but results merely in some injurious effect upon the property, the property owner must, for the sake of the general welfare, yield uncompensated obedience." (Gray v. Reclamation District No. 1500, *supra,* 174 Cal. 622, 636.)

We have arrived at this conclusion after an examination of cases from other jurisdictions. It appears that in some states the servitude operates only when the state acts upon its navigable waters for the purpose of improving navigation, and that private rights "damaged" by acts not in aid of navigation are therefore compensable. (Beidler v. Sanitary District (1904) 211 Ill. 628, 637; Natcher v. City of Bowling Green (1936) 264 Ky. 584, 592-593; State, ex rel., v. Masheter (1964) 1 Ohio St.2d 11, 12-13; In re Construction of Walnut Street Bridge (1899) 191 Pa. 153; Conger v. Pierce County (1921) 116 Wash. 27, 31; cf. Green Bay & Mississippi Canal Co. v. Kaukauna Water Power Co. (1895) 90 Wis. 370, 398; Michaelson v. Silver Beach Improvement Association, Inc. (1961) 342 Mass. 251.) This appears to be the law of the State of New York. (Marine Air Ways v. State of New York, *supra,* 201 Misc. 349, 350; Crance v. State of New York (1954) 205 Misc. 590, 593,

modified 284 App.Div. 750, reinstated 309 N.Y. 680.)[11] Other jurisdictions hold as we do in the instant case, that the state's servitude operates upon certain private rights,[12] including those of access, whenever the state deals with its navigable waters in a manner consistent with the public trust under which they are held. (Lovejoy v. Norwalk (1930) 112 Conn. 199; Frost v. Railroad Co., *supra*, 96 Me. 76, 85-87; Nelson v. DeLong (1942) 213 Minn. 425; Crary, et ux. v. State Highway Comm. (1953) 219 Miss. 284, 293-296; Darling v. City of Newport News (1918) 123 Va. 14, affd. 249 U.S. 540; Milwaukee-Western Fuel Co. v. Milwaukee (1913) 152 Wis. 247.) We are of the opinion that this view is supported not only by the present law of California, but also by considerations of sound public policy.[13]

The limitation of the servitude to cases involving a strict navigational purpose stems from a time when

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[11]We observe that New York cases antedating the *Marine Air Ways* case did not appear to construe the servitude so narrowly as did that case and those following it. (See Sage v. The Mayor (1897) 154 N.Y. 61, 76; Tiffany v. Town of Oyster Bay (1922) 234 N.Y. 15, 21; Matter of City of New York (Jamaica Bay) (1931) 256 N.Y. 382, 389.)

[12]No case has been found denying compensation when the act of the state upon its navigable waters results in actual taking of or encroachment upon fast lands. (See Natcher v. City of Bowling Green, *supra*, 264 Ky. 584; Morrison v. Clackamas County (1933) 141 Ore. 564; Conger v. Pierce County, *supra*, 116 Wash. 27.)

[13]"[E]ach State has dealt with the lands under the [navigable waters] within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. *Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.*" (Emphasis added.) (Shively v. Bowlby, *supra*, 152 U.S. 1, 26.)

the sole use of navigable waterways for purposes of commerce was that of surface water transport. (See Morreale, *op.cit.*, at p. 26.) That time is no longer with us. The demands of modern commerce, the concentration of population in urban centers fronting on navigable waterways, the achievements of science in devising new methods of commercial intercourse—all of these factors require that the state, in determining the means by which the general welfare is best to be served through the utilization of navigable waters held in trust for the public, should not be burdened with an outmoded classification favoring one mode of utilization over another.

It is clear that the conclusions above expressed dispose of plaintiffs' contention that their right of access to the navigable waters fronting on their respective properties must, in order to be of utility, include the right to navigate freely to the sea.[14] Whatever the scope and character of their right to have access to those navigable waters,[15] we hold that such right is

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[14]It should be noted that the "private property" right upon which plaintiffs base their claims is of even larger scope than a simple right to navigate freely to the sea, for that right is not here curtailed except insofar as it concerns ships with fixed structures more than 45 feet above the waterline. Thus, the "right of access" claimed by plaintiffs would seem to include a right to navigate to the sea in vessels of any size. (See fn. 8, *infra.*)

[15]As noted above (see fn. 11 and accompanying text) the State of New York appears to limit the scope of the state's servitude to those cases where the state's act is in furtherance of navigation, and requires compensation for damage to private rights occasioned by acts not in furtherance of navigation. However, in a case whose facts are similar to those at bench, the New York court construed those facts and characterized the right at issue as that of navigation, rather than access. Since, as we have indicated above, the right to navigate is a public rather than a private right, the court

burdened with a servitude in favor of the state which comes into operation when the state properly exercises its power to control, regulate, and utilize such waters.

In City of Newport Beach v. Fager, *supra,* 39 Cal. App.2d 23, defendants' access to navigable waters over their littoral land was *wholly* cut off when the city, a political subdivision of the state, filled and reclaimed the tidelands in front of their land. When the city sought to quiet title to the lands thus filled, defendants contended that they had at least a right of access over such lands to navigable water. The court rejected this contention. "We are satisfied that the correct rule is that the littoral owner of uplands upon a navigable bay has no right of access to the waters of the bay over intervening tide lands, whether filled or unfilled, which have been granted by the state to a city in trust for the purpose of improving such navigable bay in furtherance of commerce and navigation. [Citations.] Although it is true that as against a stranger a littoral owner of upland bordering upon navigable waters may not be deprived of his right of

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held that its abridgment was non-compensable even though the governmental act complained of was not undertaken in aid of navigation. (Marine Air Ways v. State of New York, *supra,* 201 Misc. 349; cf. Crance v. State of New York, *supra,* 205 Misc. 590.) Other jurisdictions have adopted a similar approach. (State, ex rel. v. Masheter, *supra,* 1 Ohio St.2d 11; see also Frost v. Railroad Co., *supra,* 96 Me. 76; Carmazi v. Board of County Com'rs of Dade County (1959) 108 So.2d 318; Moore v. State Road Department (1965) 171 So.2d 25.) We do not adopt this rationale in the instant case. The rationale we do adopt leaves open the question whether, *as against private persons,* a riparian owner's right of access connotes a right of some scope to move freely upon the surface of navigable water once the channel has been attained.

access to such waters,[16] no such right exists in favor of such littoral owner as against the state or its grantee in the exercise of a lawful use or purpose." (39 Cal.App.2d at p. 28; see also Henry Dalton & Sons Co. v. Oakland, *supra,* 168 Cal. 463, 467; People v. Hecker, *supra,* 179 Cal.App.2d 823, 840.) We are neither advised of, nor can conceive of, any reason why rules relating to one kind of navigable waters, to wit, tidewaters, should not be applied with equal reason to similar situations involving other kinds of navigable waters. In any event, we take judicial notice of the fact that tidal influence extends some distance up the San Joaquin River past the Port of Stockton. (See Witkin, Cal. Evidence (2d ed. 1966) §§ 174-176, pp. 160-163.)

We also reject plaintiffs' contention that our highway access cases (see Bacich v. Board of Control (1943) 23 Cal.2d 343; Breidert v. Southern Pac. Co. (1964) 61 Cal.2d 659) require that compensation be paid for any substantial impairment of plaintiffs' right of access. We are not persuaded that the analogy between highway access and navigational access will bear close scrutiny. The right of access to a land highway derives from the "land service road" con-

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[16]It is this right as against private persons which is the basis of cases involving condemnation of land fronting on navigable waterways. (See City of Los Angeles v. Aitken (1935) 10 Cal.App.2d 460; cf. United States v. Chandler-Dunbar Co. (1913) 229 U.S. 53; United States v. River Rouge Co., *supra,* 269 U.S. 411.) The right of access, though defeasible by appropriate governmental action, has value to the owner of riparian or littoral property, and this right must be valued in light of a realistic estimate of the chance that the government would exercise its power to diminish or curtail it.

cept, whereby roads are conceived of as arteries constructed through condemnation of private land for the purpose of serving other land abutting on them, rather than for the purpose of serving public traffic passing over them. (See Note (1965) 38 So.Cal.L.Rev. 689, 690, and authorities cited in fn. 9 thereof.) Principles applicable to such a right cannot reasonably be extended to the case of navigable waterways, which constitute a natural resource retained within the public domain for the purpose of serving public traffic in accordance with the greatest common benefit.

Finally, we emphasize that the state servitude upon lands riparian or littoral to navigable waters, like the federal servitude burdening such lands, does not extend to cases wherein the proper exercise of state power results in actual physical invasion of or encroachment upon fast lands. In the case of Miramar Co. v. City of Santa Barbara, *supra*, 23 Cal.2d 170, plaintiff was the owner of lands littoral to a navigable bay and defendant, a political subdivision of the state, constructed a permanent breakwater in the bay about three miles to the west of plaintiff's property. The effect of this breakwater upon natural drifts and currents operated in the course of time to denude plaintiff's property of sandy beach, rendering the property valueless as a beach resort. It was alleged that defendant, before it built its breakwater, knew that the effect complained of would occur. Plaintiff sued in inverse condemnation, and the trial court entered a judgment of dismissal after sustaining defendants' demurrer without leave to amend. Upon

affirmance of the judgment by this court it was said: "Plaintiff's littoral right to sandy water [which provided the accretion necessary to offset tidal washing], like its littoral right of access to the ocean, was derived entirely from the proximity of plaintiff's land to the ocean. It gave to plaintiff's land the advantage of sandy accretions. Nevertheless, the enjoyment of that advantage did not constitute a right to its perpetuation, for plaintiff's littoral rights were always subordinate to the state's rights to improve navigation.[17] The duration of the sandy accretions depended entirely upon the continuation of the littoral right, which from the beginning was subject to termination by the state. The withdrawal of the sandy accretions, constituting the damage to plaintiff's land, was an incidental consequence of the state's use of the public domain for a public interest that was at all times superior to private littoral rights. There has therefore been no taking or damaging of private property for public use within the meaning of article I, section 14, of the California Constitution." (23 Cal.2d at p. 176.) In a separate concurring opinion, it was said that direct physical encroachment or invasion upon plaintiff's lands was required in order that there be "a taking within the meaning of the constitutional provision." (23 Cal.2d at p. 178.) After reference to certain cases of the United States Supreme Court to

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[17]The improvement involved in *Miramar* was in aid of navigation. However, as we have explained *supra*, the state's power to regulate and control its navigable waters is not limited to purposes of navigation, and the servitude in its favor is of commensurate scope.

which we have adverted above (e.g., Pumpelly v. Green Bay Company, *supra,* 80 U.S. (13 Wall.) 166) the concurring opinion concluded that "The doctrine of taking under the Fifth Amendment has never been extended beyond the rule stated, and certainly there is no necessity for doing so under a constitutional provision which provides compensation for both taking and damaging." (23 Cal.2d at pp. 178-179.) Three justices of the court dissented upon the basis that under the facts a physical taking of the plaintiff's land *was* involved.

It therefore appears that this court in the *Miramar* case, though divided as to the proper result under the facts there at issue, reached fundamental agreement on the extent to which the state, through the proper exercise of its trust power to deal with navigable waters, may impair without compensation rights appurtenant to property riparian or littoral to such waters. The servitude with which such property is burdened precludes compensation for impairment or curtailment of all rights not damaged by permanent physical invasion of or encroachment upon fast lands; when the exercise of the power does cause such physical invasion or encroachment, the servitude is inapplicable and rights damaged as a result are compensable in accordance with article I, section 14, of the state Constitution.

We hold that plaintiffs' right of access from their respective riparian properties to the waters of the channel, whatever its scope as against private parties, is burdened with a servitude in favor of the state and

that, since there is here no direct physical invasion of, or encroachment upon, said properties by the state, plaintiffs are not entitled to compensation for the abridgment or diminution, if any, of such right of access as a result of the lawful exercise of the state's power to regulate, control and deal with its navigable waters.

The judgments are, and each of them is affirmed.

Sullivan, J.

We concur:

Traynor, C. J.
McComb, J.
Tobriner, J.
Burke, J.

Appendix A, Exhibit (4)

Colberg v. State of California
Stephens Marine, Inc. v. State of California
Sac. 7694

DISSENTING OPINION by PETERS, J.

I dissent.

I cannot agree that because the state wants to build two low level highway bridges across the mouth of an inlet where plaintiffs' shipyards are located, plaintiffs must suffer the complete loss caused by the impairment of their right of one-way water access to deep water. Principles of fairness, logic and public policy suggest that this loss is a part of the cost of the freeway that should not be borne by plaintiffs but should be borne by the public. Compensation should therefore be allowed.

The access impaired here is one-way access to the oceans of the world. Such access is indispensable to the operation of plaintiffs' businesses.[1] So, the impairment is not technical. It is substantial and different in nature and degree from the impairment suffered by the general public. There is not involved the mere hypothetical damage to vacant land, nor are we dealing with speculators, nor with newly

[1]Colberg alleges that 81 percent of its current business is derived from ships unable to reach its shipyard under a bridge but 45 feet in height. Stephens alleges it will lose 35 percent of their business if the bridges are built. The Carquinez bridges, it should be mentioned, are 135 feet above the water.

created businesses. Both plaintiffs have been operating bona fide shipyards in the inlet for over 60 years. Thus, we are not involved with a mere incidental impairment of the right of access but are dealing with a very substantial impairment. The impairment is not caused by a construction strictly in aid of navigation but the bridges are part of a state freeway. If the freeway impaired land access to the same degree such impairment would be compensable. These facts are indisputable.

The majority hold that, under these facts, case law and public policy dictate the conclusion that compensation should not be allowed. So far as case law is concerned the majority have done a commendable job in collecting the cases discussing the nature of the rights involved. But all that this exhaustive analysis proves is that there are no definitive cases in California, and that the decisions of other states reach conflicting results. A decision either way is permissible under the cases. Thus, the decision in this case is really a public policy one, and the majority, recognizing this, claim that public policy supports their conclusion. How can there be a public policy to cut off plaintiffs' only access to deep water and so put well established businesses out of operation without compensation? The answer is obvious. There can be and is no such public policy. The question is not an open one. It has been decided that, as a matter of public policy, impairment of land access under such circumstances requires compensation. The majority fly in the face of that determination.

Today government is big and complex and constantly growing bigger. The legitimate need of government for property is constantly expanding. Thus, more and more frequently, the rights of individuals and the government come into conflict. When this occurs then this court must referee the conflict and try to protect the rights of the state and the rights of the individual. In doing so we must keep in mind the admonition of our Constitution that property "shall not be taken or damaged for public use without just compensation."[2]

Nowhere is this conflict between the state and the individual made more apparent than by the state's need to build new highways and freeways which frequently include, as here, the building of bridges. The problem became very apparent in the construction of the freeways and the approaches leading to the San Francisco Bay Bridge. Rights of access were obviously impaired. In the case of Bacich v. Board of Control, 23 Cal.2d 343, where the construction of the approaches to the Bay Bridge placed plaintiff's land and property in a cul-de-sac, the problem was directly presented. Plaintiff had still one-way access to the general system of streets but his access in the other direction was substantially cut off. There was no controlling case in California. Cases elsewhere were in conflict. The court recognized that it was a problem

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[2]Article I, section 14 of our state Constitution. See also article XV, section 1 of that Constitution which provides "The right of eminent domain is hereby declared to exist in the State to all frontages on the navigable waters of this State."

of first impression, and that it was required to determine the public policy of this state. It then showed no hesitancy, as it does now, to declare such policy. It held that when the right of access was impaired, as distinguished from a physical taking or damaging, there must be a weighing of the conflicting rights. Thus, where the impairment is substantial and peculiar to the plaintiff, and can be compensated for without prohibitive cost, it is compensable. But where the impairment is incidental and where the cost of compensation is prohibitive it is not compensable. Thus, impairment of access to one in a cul-de-sac was held compensable, but property owners beyond the next intersecting street were not to be compensated. Nor were property owners to be compensated where their access street was made into a one-way street or into a divided highway, or left turns were prohibited. (See Bacich v. Board of Control, *supra,* 23 Cal.2d 343, particularly the concurring opinion of Edmonds, J., p. 356, 358 et seq.; Breidert v. Southern Pac. Co., 61 Cal.2d 659; Valenta v. County of Los Angeles, 61 Cal. 2d 669.) The court showed no reluctance in *Bacich* and the other cases in declaring that a material impairment of the right of access should be compensable as a matter of public policy. But the majority in the instant case repudiate that public policy and purport to hold that public policy now compels a contrary result. The two lines of authority are inconsistent and incompatible. If we were right in the land access cases the majority are wrong in this case.

The major error in the majority opinion is its holding that all the state's uses of its navigable waters must be treated in the same identical fashion. It may be that when the state acts strictly in aid of navigation that the right of the state is absolute and the property owner is entitled to no compensation (Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170) for impairment of his rights. But where the use by the state is not strictly for navigation purposes, but, as here, is for freeway purposes, principles of equity, justice, fairness, and certainly of public policy, dictate that the same public policy declared in the land access cases should apply.

When this case was before the Court of Appeal of the Third Appellate District, Justice Friedman prepared a scholarly and exhaustive opinion for the court that discusses these positions in depth. The following portions of that opinion are adopted as part of this dissent. (Colberg, Inc. v. State of California (Cal.App.) 55 Cal. Rptr. 159.)

"The amendment of state constitutions, including California's, to provide compensation when private property is 'damaged' as well as 'taken' for public use, indicates an intent to expand the area of compensability, requiring the courts to fix its limits by placing the economic interests of the public in balance against the sacrifices imposed on the landowner. (Bacich v. Board of Control, 23 Cal.2d 343, 350-351, 144 P.2d 818; concurring opinion of Edmonds, J. ibid., pp. 358-360, 144 P.2d pp. 826-832; see Albers v. County of Los Angeles, 62 Cal.2d 250, 262-

263, 42 Cal.Rptr. 89, 398 P.2d 129.) The case-by-case balancing of these competing interests results in judicial expansion or contraction of a group of intangible rights recognized as compensable 'private property.' Compensable property, it is now recognized, includes not only the physical land and improvements but certain intangible rights of access between the land and the outside world. Thus, although the owner uses the streets in common with the rest of the public, he owns a private easement of access which consists of the right to get into the street abutting his property and thence to the general system of public streets and highways. (Valenta v. County of Los Angeles, 61 Cal.2d 669, 671, 39 Cal. Rptr. 909, 394 P.2d 725; Breidert v. Southern Pac. Co., 61 Cal.2d 659, 663, 39 Cal.Rptr. 903, 394 P.2d 719, citing preceding California decisions; cf. Sneed v. County of Riverside, 218 Cal.App.2d 205, 32 Cal. Rptr. 318, re airspace invasion.) Not every impairment of access to the general system of public streets is compensable in eminent domain. Compensability, rather, requires an individualized finding of substantial impairment, a finding of fact delegated to the trial court and not the jury. (Breidert v. Southern Pac. Co., supra, 61 Cal.2d at pp. 663-665, 39 Cal.Rptr. 903, 394 P.2d 719; People v. Ricciardi, 23 Cal.2d 390, 402-403, 144 P.2d 799.)

"The central problem is to locate a line between compensable damage to private property and disadvantages of the kind called 'consequential.' Of the latter sort are such elements as loss of business and

diminution of traffic caused by diversion of traffic and circuity of travel. (People ex rel. Department of Public Works v. Symons, 54 Cal.2d 855, 860, 9 Cal. Rptr. 363, 357 P.2d 451.) Applying the economic balancing test, the Supreme Court points out that awards of the latter sort would severely burden the public treasury and produce '"an embargo upon the creation of new and desirable roads."' (Ibid., p. 862, 9 Cal.Rptr. 367, 357 P.2d p. 455.)

"The street access doctrine represents an expanded notion of the constitutional concept of private property whose invasion or damage is compensable in eminent domain. It means that 'property' in an eminent domain sense includes not only a piece of the earth's surface but an intangible right of movement between it and the outside world; that, although the channels of movement are shared with the public, they are 'private' and compensable when a public improvement devalues a particular piece of land by substantially impairing these channels. Navigable waterways are channels of movement no less than streets and highways. (See Chicago, M. & St. P. Ry. Co. v. City of Minneapolis, 232 U.S. 430, 442, 34 S.Ct. 400, 58 L.Ed. 671; Wattson v. Eldridge, 207 Cal. 314, 320, 278 P. 236; People v. Gold Run D. & M. Co., 66 Cal. 138, 147, 4 P. 1152.) There is no difference in principle or policy between land and sea access which affirms an easement of access by land and denies it by water. If a public project obstructs the owner's access to the outside world, he is equally hurt whether the barrier blocks him by land or by sea. A littoral

property owner's easement of access includes both media of movement.

"Claims for loss of street access often arise because the public improvement places private property on a cul-de-sac, restricting accessibility to one direction only, e. g., Valenta v. County of Los Angeles, supra; Bacich v. Board of Control, supra. The Colberg and Stephens shipyards are situated on a natural cul-de-sac. Without the intervention of the public improvement, they have marine access to the outside world in one direction only. According to the complaints, construction of the public project will obstruct much of the single marine route between their property and the outside world. Their private right of access to the navigable water in front of their property has little value if that is as far as they can go.[5] Location on a partially blocked, marine cul-de-sac is one element in the group of circumstances indicating the occurrence or absence of a substantial impairment of the easement of access.

"Doubtless these shipyards have street access on the landward side. Shoreline properties have obvious economic attributes resulting from their accessibility by water. Residual access by land may supply scant economic solace when marine access beyond the immediate waterfront is obstructed or destroyed. The

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"[5]At this point we paraphrase the majority opinion in Bacich v. Board of Control, supra, 23 Cal.2d at p. 354, 144 P.2d at p. 825, which states: 'To be able to get onto the street immediately in front of the property is of little value if that is as far as [the owner] can go.'"

substantial impairment rule supplies a criterion for determining whether the retention of land access and the destruction or obstruction of marine access result in compensable damage.

"The state contends that the street access doctrine is only an analogy. It suggests that the public policy of the street access cases, where economic balancing is possible, does not apply to loss of marine access; that the public can supply economical alternative routes to compensate for closed streets but not for closed waterways; further, that a bridge of limited clearance across a busy waterway may elicit damage claims so heavy and widespread as to prevent the project. These factors evoke no policy considerations excluding access by water from the general easement of access recognized in eminent domain. The balancing approach is much broader than the street access cases. It is employed to measure the reach of the policy underlying the eminent domain provision of the state Constitution, laying down a line which separates compensable injuries from noncompensable disadvantages. In Albers v. County of Los Angeles, supra, it is used in the context of a landslide damage claim; in Clement v. State Reclamation Board, 35 Cal.2d 628, 642, 220 P.2d 897, to determine compensability of flood damage. In the course of the latter decision the court states: 'The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.' (Clement v. State Reclamation Board, supra, 35 Cal.2d at p. 642, 220 P.2d at p. 905.)

"Viewed in the light of the economic balancing criterion, the present injuries are sharply focused on two properties. They arouse no concern for the public purse beyond that involved in any eminent domain proceeding. While shared with the general public, marine passage along Upper Stockton Channel without a height restriction is a unique economic attribute of two commercial shipyards located on a marine cul-de-sac.[6] The prospect of damage claims from the two owners is not so monumental as to discourage the freeway project of which the bridges are a part. The taxpayers can absorb the cost with far less hardship than the owners. (Albers v. County of Los Angeles, supra, 62 Cal.2d at p. 263, 42 Cal.Rptr. 89, 398 P.2d 129.)

"The selection between a low level bridge and reasonable alternatives is essentially a budgetary and planning choice by the administrator. Potential damage to the littoral owners may approach the cost of raising the bridge level. At that point the administrator starts thinking of an acceptable alternative, for example, a higher bridge. Intangible community values imperiled by the extended ramps of a high bridge may impel his return to the low level design. Whatever motivates the administrator to choose a low level bridge, dollars or intangible community values, the individual property owner 'if uncompensated would contribute more than his proper share to the public undertaking.' (Clement v. State Reclamation Board, supra, 35 Cal.2d at p. 642, 220 P.2d at p. 905.)

"[6]At this point we refrain from anticipating the computation of damage and from indicating the relationship between loss of business and devaluation of property."

"The specter of widespread damage claims caused by a bridge athwart a busy artery of marine commerce arouses no policy tremors. Potential economic injuries from obstructions to navigation are limited by federal statutes investing the Chief of Engineers and the Secretary of the Army with discretionary permit powers in the interest of protecting navigation. (See 33 U.S.C. §§ 401, 403; Ryan v. Chicago, B. & Q. R. Co., 7th Cir., 59 F.2d 137, 142.) Unless the federal officials abdicate their responsibilities, a low level, drawless bridge across the Carquinez Straits or the mouth of the Mississippi is a theoretical but not practical possibility. It is reasonable to suggest that the present bridge project merited a federal permit only because the 45-foot limitation on navigation had narrow economic impact on two shipyards located on a marine cul-de-sac; that at some point potential injury to additional maritime interests would provoke denial of a federal permit. Injury claims remaining after the federal screening must then pass a second screening, that imposed by the economic balancing test, which measures the limit of compensability under the California Constitution. Finally, the claim must pass the substantial impairment test. These successive filters prevent compensable injuries to navigation so widely diffused that they are more public than private.

"We resist the invitation to follow the nuisance and equity decisions which deny upstream owners relief against downstream bridges which obstruct navigation. (See cases cited fn. 4, supra.) [Fn. 4. Gilman v. City of Philadelphia, 3 Wall. 713, 70 U.S. 713, 18 L.Ed. 96;

Miller v. Mayor, etc., of City of New York, 109 U.S. 385, 3 S.Ct. 228, 27 L.Ed. 971; Cardwell v. American River Bridge Co., 113 U.S. 205, 5 S.Ct. 423, 28 L.Ed. 959; Pacific Inter-Club Yacht Assn. v. Morris, D.C., 197 F.Supp. 218; Jarvis v. Santa Clara Valley R.R. Co., 52 Cal. 438; People v. Potrero and Bay View P. R. Co., 67 Cal. 166, 7 P. 445; cf. Hickok et al. v. Hine, 23 Ohio St. 523; see also Sound Marine & Machine Corp. v. Westchester County, 2d Cir., 100 F.2d 360.] Such decisions turn largely on the 'public' character of the right of navigation and the private plaintiff's lack of standing to seek relief against a public nuisance not peculiar to himself. In the search for an eminent domain concept of 'private property,' equity and nuisance decisions are not a trustworthy guide (see Clement v. State Reclamation Board, supra, 35 Cal.2d at p. 641, 220 P.2d 897). Preferable to analogies drawn from other branches of the law is the self-contained 'easement of access' doctrine developed as part of the California law of eminent domain.

"Eminent domain decisions in other states on compensability of obstructions to navigation vary. The variation is often prompted by the language of the particular state's constitutional provision. In Pennsylvania, where the Constitution was amended to provide compensation for property 'injured' as well as taken, a wharf owner was awarded damages when a city bridge prevented vessels from passing upstream to his wharf. (In re Construction of Walnut St. Bridge, 191 Pa. 153, reported sub nom. Gumbes v. City of Philadelphia, 43 A. 88.) In State v. Masheter, supra, where

the Ohio Constitution limited compensation to a 'taking,' the court denied recovery under similar facts. One of the Ohio judges dissented, believing that the riparian terminal operator had developed a private right of navigation which was separate from that of the public and was 'taken' from him by the bridge.[7] In New York a similar claim was denied on the theory (imported from the equity and nuisance decisions) that the right of navigation is 'exclusively a public right.' (Marine Air Ways v. State, supra, 201 Misc. 349, 104 N.Y.S.2d at p. 967, affd. 280 App.Div. 1021, 116 N.Y.S.2d 778.) The Florida courts have adopted the same rationale. (Moore v. State Road Dept., supra (Fla. App.) 171 So.2d 25; Carmazi v. Board of County Com'rs of Dade Co., supra (Fla.App.) 108 So. 2d 318.) None of these decisions considered the easement of access doctrine evolved as part of the California law of eminent domain. None of them considered the balancing of policies implicit in the easement of access doctrine.

"Both sides seek support in City of Los Angeles v. Aitken, 10 Cal.App.2d 460, 52 P.2d 585. The action was one to condemn littoral rights on a navigable lake whose level would be lowered by the condemning agency's diversion of tributary streams. The defendant owned shoreline resort property. According to the opinion, the marginal owner's privilege of boating was not itself compensable, but constituted an element in the valuation of his shoreline property. The case sup-

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"[7]Cf. Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170, 183, 143 P.2d 1, dissent of Carter, J."

plies no precedent here, since it involves a destruction of the littoral owner's private right of access to navigable water directly fronting on his property.

"The second major question is posed by the doctrine denying compensation when a littoral owner's interests in navigable water are damaged through the exercise of the 'navigation servitude,' that is, through the public's paramount power to control navigable waters in the interest of navigation and commerce. (See generally Miramar Co. v. City of Santa Barbara, supra, 23 Cal.2d 170, 143 P.2d 1; 2 Nichols [on Eminent Domain (3d. ed.)] op. cit., pp. 247-258.) The state relies upon cases which seemingly extend the doctrine to public improvements which aid commerce as well as those aiding navigation. (Henry Dalton & Sons Co. v. Oakland, supra, 168 Cal. 463, 467, 143 P. 721; City of Newport Beach v. Fager, supra, 39 Cal.App.2d at p. 28, 102 P.2d 438.) It points out that the proposed bridges are part of an interstate freeway project which will improve access to Stockton harbor and benefit land and water transportation.

"Broad dicta in some of the decisions permit identification of the navigation servitude with the promotion of 'commerce' without express restriction to waterborne commerce. Such statements should not be taken out of context. Decisional law rejects the notion that any project facilitating commerce is *ipso facto* within the sovereign power over waterways. Nor do the parallel powers of the federal and state governments over navigation include every public project affecting the navigable capacity of water. Although most gen-

eralizations entail some peril, the general tenor of the decisions is that the navigation servitude is limited to public works designed to aid or control navigation, excluding projects for other purposes.[8] A leading case refers to the navigation servitude as one embracing 'such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.' (Scranton v. Wheeler, 179 U.S. 141, 163, 21 S.Ct. 48, 57, 46 L.Ed. 126.) Freeways and streets along the waterfront are outside the scope of the navigation servitude (In re City of New York, 168 N.Y. 134, 61 N.E. 158, 56 L.R.A. 500; In re Jamacia Bay in City of New York, etc., 256 N.Y. 382, 176 N.E. 539; Crance v. State, supra, 205 Misc. 590, 128 N.Y.S.2d 479) although there is contrary authority (Crary v. State Highway Comm., 219 Miss. 284, 68 So. 2d 468). Deepening the channel of a stream to prevent overflows harmful to roads and bridges is not an exercise of the navigation power. (Conger v. Pierce Co., 116 Wash. 27, 198 P. 377, 18 A.L.R. 393.) The proposed freeway bridges across the Upper Stockton Channel will not aid its development as a medium of commerce. Rather they will obstruct its navigability, albeit the obstruction will be sanctioned by federal law. (See Southlands Co. v. City of San Diego, 211 Cal. 646, 297 P. 521.)

"[8]United States v. River Rouge Imp. Co., supra, 269 U.S. at p. 419, 46 S.Ct. 144, 70 L.Ed. 339; United States v. 50 Foot Right of Way in Bayonne, N.J., 337 F.2d 956, 959; United States v. 412.715 Acres of Land, 53 F.Supp. 143, 149; City of Los Angeles v. Aitken, supra, 10 Cal.App.2d at p. 470, 52 P.2d 585; Crance v. State, 205 Misc. 590, 128 N.Y.S.2d 479, 481, reversed on other grounds 309 N.Y. 680, 128 N.E.2d 324; 26 Am.Jur.2d, Eminent Domain, § 191, p. 870; Note: 18 A.L.R. 403."

"The state seeks to extend the navigation servitude on the strength of decisions permitting improvements on publicly owned tidelands without compensation for the upland owner's loss of access, e.g., Miramar Co. v. City of Santa Barbara, supra, 23 Cal.2d 170, 143 P.2d 1; Henry Dalton & Sons Co. v. Oakland, supra, 168 Cal. 463, 143 P. 721; City of Newport Beach v. Fager, supra, 39 Cal.App.2d 23, 102 P.2d 438. In those cases the public's immunity is said to extend not only to tideland projects promoting navigation but to any 'lawful use or purpose.' (People v. Hecker, 179 Cal. App.2d 823, 840, 4 Cal.Rptr. 334; City of Newport Beach v. Fager, supra, 39 Cal.App.2d at p. 28, 102 P. 2d 438.) The tideland cases turn upon the principle that the littoral rights of an owner whose land adjoins publicly owned tidelands may be terminated by whatever disposition of the tidelands the public chooses to make. (Miramar Co. v. City of Santa Barbara, supra, 23 Cal.2d at p. 174, 143 P.2d 1.) Although public tidelands are held in trust for commerce, navigation and fishery, projects on tidelands may have nothing to do with navigation. Subject to the restrictions in statutory grants, public tidelands may be devoted to any use which does not prejudice the public rights of navigation and fishing. (Mallon v. City of Long Beach, 44 Cal.2d 199, 206, 282 P.2d 481; Boone v. Kingsbury, 206 Cal. 148, 183, 189, 273 P. 797.) Thus the public's power to improve its tidelands without compensating littoral owners is not a measure of the navigation servitude when tideland use is not involved.

"Finally, the state urges that the federal permit to construct the low level bridge project across Upper Stockton Channel is 'conclusive.' Perhaps it is, in the limited sense that a court may not restrain an obstruction to navigation permitted by federal law. (See cases cited fn. 4, supra.) The permit is only a declaration of federal assent, not a delegation of power.[9] Federal assent to the project does not shield the state from the eminent domain provision of its own constitution. 'It must be remembered . . . that damage may be inflicted within the meaning of such a constitutional provision by the mere exercise of unquestioned public rights.' (2 Nichols, op. cit., p. 265.)

"We conclude that the bridge project is not an exercise of the state's navigation servitude; that the project will cause compensable damage to plaintiffs' private properties if, in an appropriate proceeding, a court finds substantial impairment of their respective easements of access."

For these reasons I believe the judgments should be reversed.

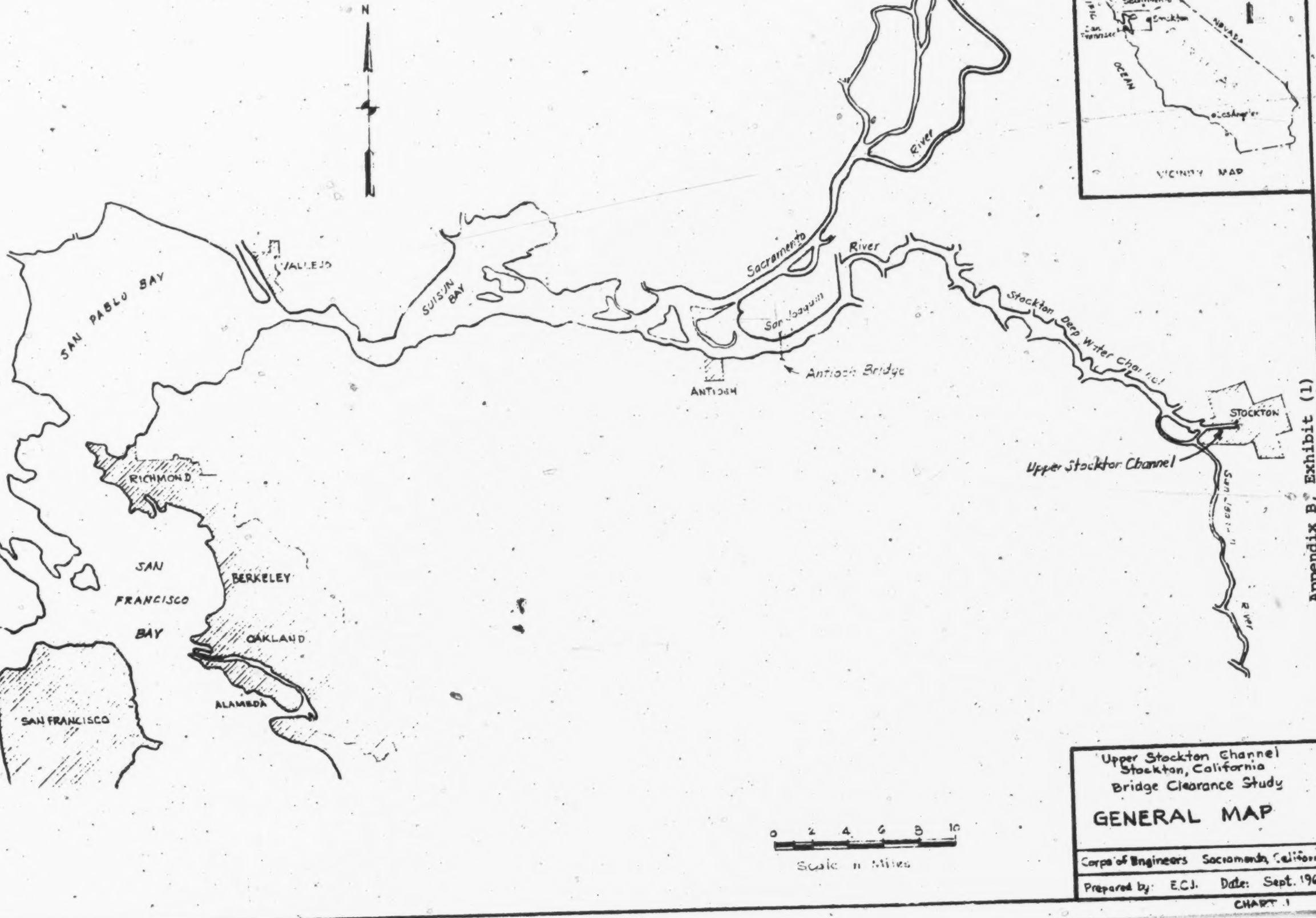
Peters, J.

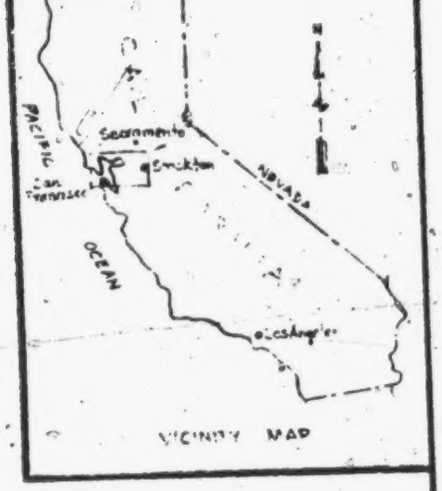
I Concur:

Mosk, J.

Filed, October 3, 1967,
William I. Sullivan, Clerk.

"[9]Cummings v. City of Chicago, 188 U.S. 410, 430-431, 23 S.Ct. 472, 47 L.Ed. 525; Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 146 So. 249, 255; Cobb v. Lincoln Park Com'rs., 202 Ill. 427, 67 N.E. 5, 9, 63 L.R.A. 264; Wilson v. Hudson County Water Co., 76 N.J.Eq. 543, 76 A. 560, 565-566; Sullivan v. Booth & Flinn, 210 App.Div. 347, 206 N.Y.S. 360, 363."





Appendix B, Exhibit (1)

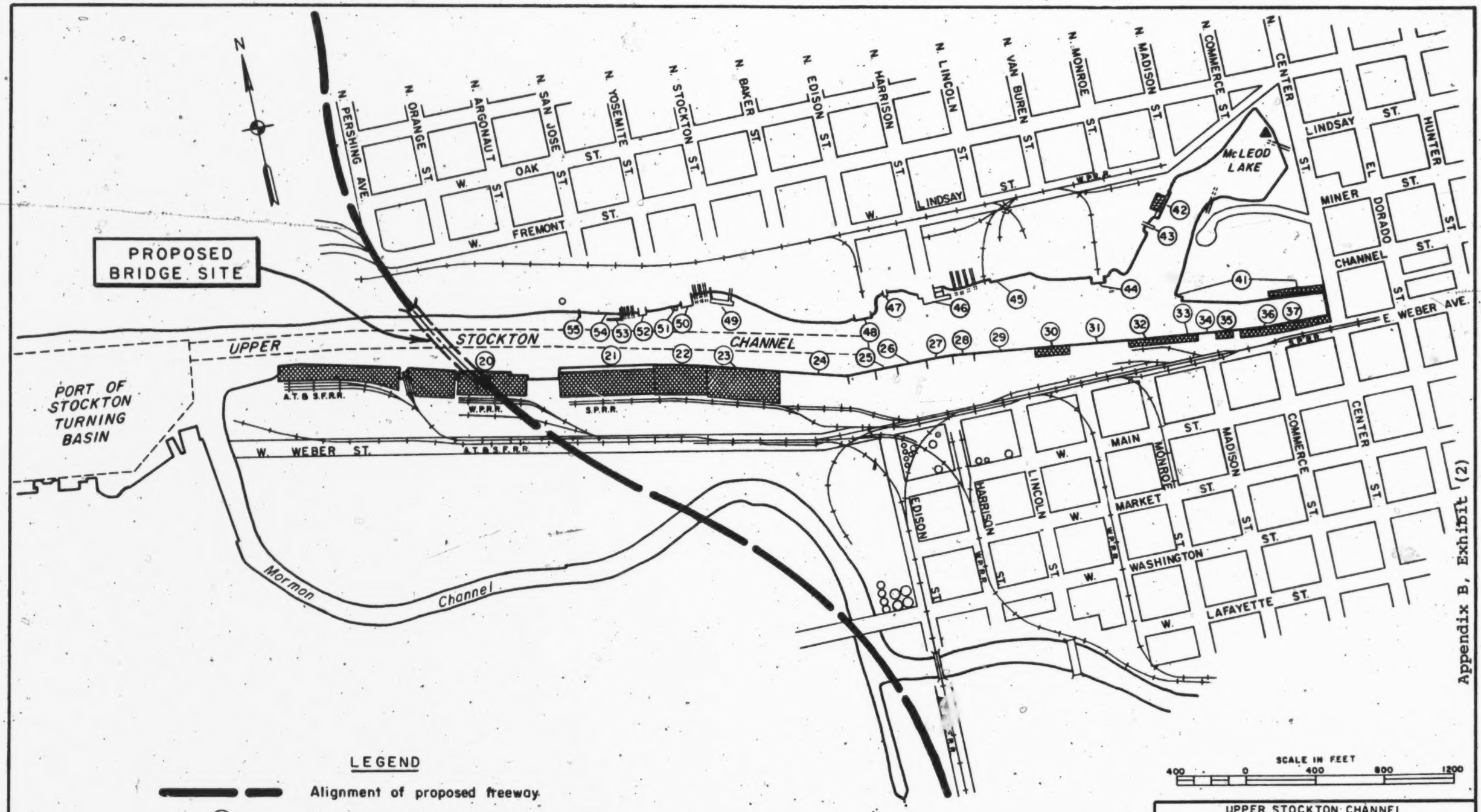
Upper Stockton Channel
Stockton, California
Bridge Clearance Study

GENERAL MAP

Corps of Engineers Sacramento, California

Prepared by: E.C.J. Date: Sept. 1962

CHART 1



LEGEND

- Alignment of proposed freeway
- (20) Navigation facility (listed in table IV)
- Marine railway
- ▲ Water level gage

SCALE IN FEET
400 0 400 800 1200

UPPER STOCKTON CHANNEL
STOCKTON, CALIFORNIA
BRIDGE CLEARANCE STUDY

LOCATION MAP

Corps of Engineers	Sacramento, California
Prepared by: E.C.J.	Date: May 1962

Chart 2

Appendix B, Exhibit (2)

AERIAL VIEW OF UPPER STOCKTON CHANNEL

PHOTO NO. 1

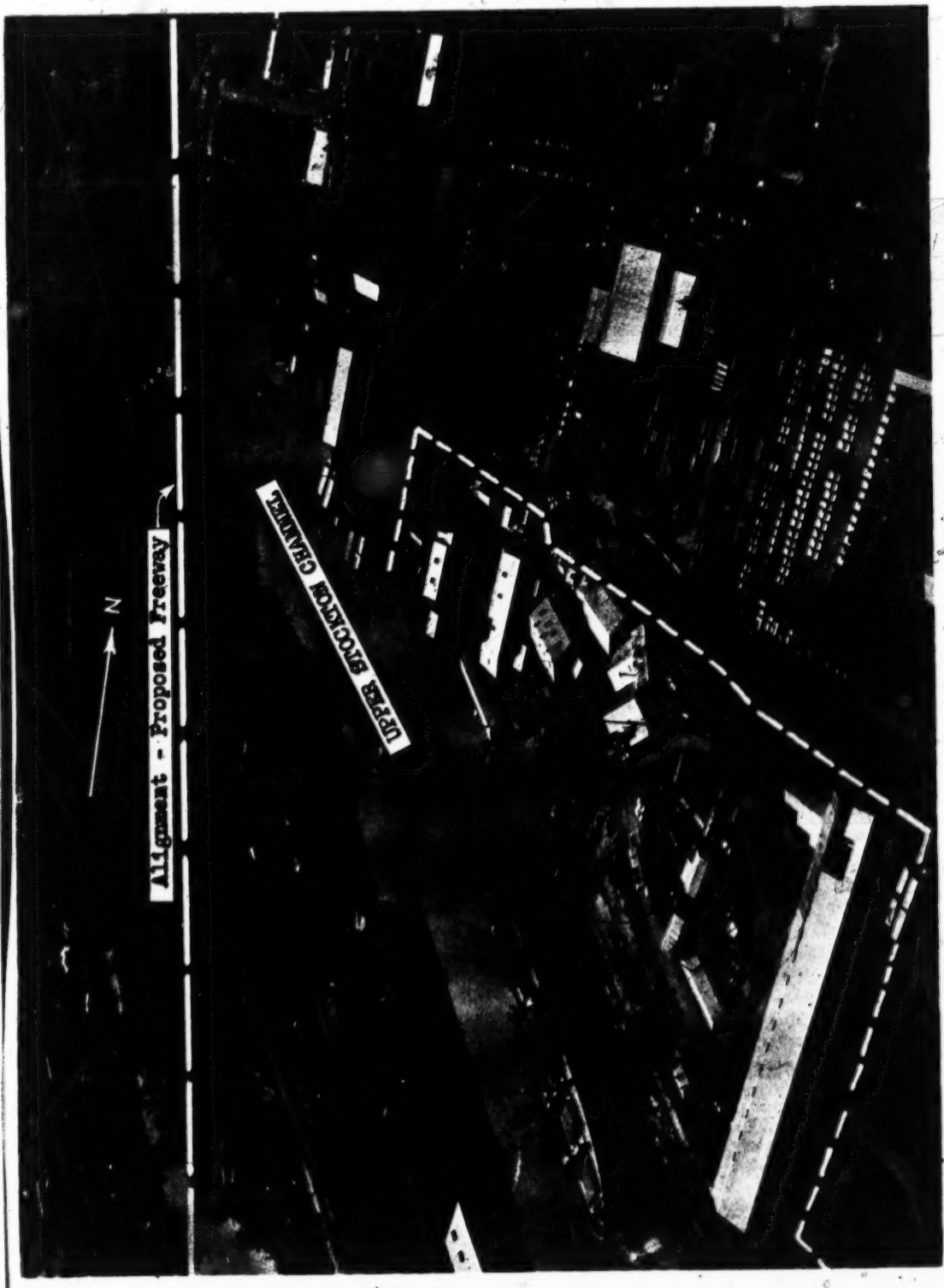


PHOTO NO. 2

Appendix B, Exhibit (4)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 960

COLBERG, INC., et al.,
Plaintiffs and Appellants,

vs.

STATE OF CALIFORNIA, ex rel.,
DEPARTMENT OF PUBLIC WORKS,
Defendant and Respondent.

STEPHENS MARINE, INC.,
Plaintiff and Appellant,

vs.

STATE OF CALIFORNIA, ex rel.,
DEPARTMENT OF PUBLIC WORKS,
Defendant and Respondent.

CONSOLIDATED CASES

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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CONSOLIDATED CASES

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

I. Statement of the Case

Procedurally the petitioners are seeking review of an adverse decision by the California Supreme Court.

Substantively petitioners are attempting to remove California's navigable waterways from their proper category as a natural resource and redefine these navigable waters as private property.

The litigation has reached its present posture based on the following facts:

The State of California, in cooperation with the federal government, as a part of the National Interstate Highway System proposes to build two parallel highway bridges across the upper Stockton Channel in San Joaquin County, which is a navigable tidal waterway. This natural navigable channel connects with the San Joaquin River whose waters ultimately reach the Pacific Ocean.

The State of California has obtained the necessary permits for the construction of the bridges from the requisite government authorities. These authorities include the federal government which has complete and final determination regarding the vertical and horizontal clearances of navigable waters.[1] The federal government, acting by and through the Secretary of the Army and Chief of the Corps of Engineers held hearings and ultimately issued a permit establishing for the bridges a vertical clearance of 45 feet above the waters of the Upper Stockton Channel.

The petitioners, who are owners of shipyards located upstream from the proposed interstate highway bridges, filed declaratory relief actions alleging that they had somehow acquired a vested *private* prop-

[1] The permit is a conclusive determination that the bridge does not obstruct navigation, which determination has the force of law. *Miller* v. *City of New York*, 109 U.S. 385, 3 S.Ct. 228, 232–3; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 33 S.Ct. 667, 672; *Southern Pac. Co.* v. *Olympian Dredging*, 260 U.S. 205, 43 S.Ct. 26, 27; *United States* v. *Appalachian Electric Power Co.*, 311 U.S., 377, 61 S.Ct. 291, 307; *Pacific Inter-Club Yacht Association* v. *Morris*, 197 F. Supp. 218, 220.

erty right to navigate to and from the oceans of the world with a vertical clearance of not less than 135 feet (this 135-foot limit is set by existing fixed highway bridges located between petitioners and the ocean).

Petitioners assert that a determination of this case will affect only their two shipyards. Such a position has only superficial accuracy. It is true that the ultimate decision will resolve an immediate conflict between litigants. However, the decision's impact goes far beyond two shipyards. Whether a short channel or a big river such as the Mississippi is involved, the same sweeping question arises:

> Are the navigable waters of a State subject to private ownership which could inhibit their development by the public in connection with other modes of commerce such as highways?

The California Supreme Court recognized the broad issue presented for its determination.

> "Indeed, plaintiffs, while scrupulously eschewing all claims based on a public right, have been forced into the position of extending a private right in a meandering continuum from their properties to the Pacific Ocean and, as counsel for the state observed at oral argument, now claim a property right in 'a column of air 135 feet high extending from their properties to the sea.' We cannot refrain from observing that were the bridge here involved proposed for the Carquinez Straits instead of the Upper Stockton Channel, plaintiffs, consistently with the theory of their

pleadings, would advance the same basic claim for compensation. If such claim could be considered valid for plaintiffs, it would also be assertible by the countless riparian owners in the intervening section of the watercourse." (Pet. A. 27)

"It should be noted that the 'private property' right upon which plaintiffs base their claims is of even larger scope than a simple right to navigate freely to the sea, for that right is not here curtailed except insofar as it concerns ships with fixed structures more than 45 feet above the waterline. Thus, the 'right of access' claimed by plaintiffs would seem to include a right to navigate to the sea in vessels of any size." (Pet. A. 37)

The California trial court rejected petitioners' arguments for the reasons that:

(1) A littoral or riparian owner does not have a *private property right* to downstream navigation. Navigation on navigable waterways is merely a privilege shared in common with the public and subject to public control which is not protected by the California or United States Constitutions.

(2) The State of California can regulate and control commerce on its navigable waters without the payment of compensation.

The California Supreme Court affirmed this trial court decision in an extensive and well-reasoned opinion. (Pet. A.Ex. 3) A subsequent petition for rehearing was denied without opinion.

II. The Scope of Private Access Rights in Navigable Waterways Depends Upon State Law

The division of State-Federal jurisdiction is accurately recounted by the California Supreme Court in its decision. The State is recognized as having absolute sovereign rights over its navigable waterways limited only by the paramount delegated powers of the federal government to regulate commerce. (Pet. A. 29)

Under this dichotomy of responsibility it is left for *State* law to determine the scope of *private* access or other rights in navigable waters. *Shively* v. *Bowlby,* 150 U.S. 1, 14 S. Ct. 548, 563; *U.S.* v. *Rands, 389* U.S. *121, 126;* 88 S. Ct. 265, 268.

The California Supreme Court has chosen to define the right to navigate to the oceans of the world as a public rather than a private right. In view of the weight of State and Federal authority supporting that position it is difficult to recognize a reason for further review by this Court. (See discussion III infra)

Petitioners also appear to be arguing that the State of California has usurped federal authority to regulate commerce by constructing the twin Interstate Highway Bridges. Such a position ignores the very fact which petitioners have conceded to be true.

The present bridge project was undertaken only *after* receiving approval from the federal govern-

ment. As indicated by the California Supreme Court's decision:

> ". . . Pursuant to federal law the state applied to the Secretary of the Army and the Chief of Engineers for a permit to build such bridges. (See 33 U.S.C.A. § 525, subd. (b).) After a public hearing, consideration of the views of various interested persons including these plaintiffs, and an extensive economic survey, approval of the location and plans of the bridges was granted by federal authorities in February 1964, subject to conditions not here necessary to be detailed." (Pet. A. 23–24)

It is this hearing and permit procedure which protects the rights of those engaged in navigation and commerce. Obviously a state cannot usurp the federal government's permit authority, since without a permit the structure would be an unlawful obstruction subject to immediate removal as a nuisance.

III. A Riparian or Littoral Owner Located on Navigable Waters Does Not and Should Not Have a Private Property Right to Navigate to the Waters of the World

As indicated earlier, the central issue presented throughout this appeal has been:

> Did petitoners have a *private* property right to navigate over public navigable waters with vessels exceeding 45 feet in vertical clearance?

Petitioners now allege that (1) the California Supreme Court did not resolve this issue, and (2) they resolved it improperly.

Contrary to petitioners' statements the California Supreme Court expressly and correctly decided the property question by stating:

> ". . . We are of the further view that the law of California burdens property riparian or littoral to navigable waters with a servitude commensurate with the power of the state over such navigable waters, and that 'when the act [of the state] is done, if it does not embrace the actual taking of property, but results merely in some injurious effect upon the property, the property owner must, for the sake of the general welfare, yield uncompensated obedience.' (Gray v. Reclamation District No. 1500, *supra,* 174 Cal. 622, 636.)" (Pet. A. 35)

The policy basis for their decision could not have been more clearly spelled out:

> ". . . The demands of modern commerce, the concentration of population in urban centers fronting on navigable waterways, the achievements of science in devising new methods of commercial intercourse—all of these factors require that the state, in determining the means by which the general welfare is best to be served through the utilization of navigable waters held in trust for the public, should not be burdened with an outmoded classification favoring one mode of utilization over another.
>
> "It is clear that the conclusions above expressed dispose of plaintiffs' contention that their right of access to the navigable waters fronting on their respective properties must, in order to be of utility, include the right to navigate freely to the sea.

> Whatever the scope and character of their right to have access to those navigable waters, we hold that such right is burdened with a servitude in favor of the state which comes into operation when the state properly exercises its power to control, regulate, and utilize such waters." (Pet. A. 37–38)

The result reached by the California Supreme Court is not the far out, unsupported, visceral reaction of a single maverick jurisdiction. The opinion is a well-reasoned, legally supported document arriving at a conclusion which is in accord with the result reached by prior California, non-California, and Federal decisions.

As acknowledged by the intermediate California appellate court which gave petitioners intermediate comfort:

> "According to the weight of authority, a littoral owner's right to navigate between his land and the world's oceans is not a private right, but one which he shares with the general public; hence he has no constitutional right of eminent domain compensation when a downstream bridge 'without draws' cuts him off from the outside world. ... ." (Pet. A. 7)

Such a concession is compelled by the authorities which overwhelmingly declare that the right to navigate is a *public* privilege not a *private* property right:

State Authorities:

Moore v. *State Road Department,* (Fla) 171 So. 2d 25, 28 (Upstream owners claimed new highway bridge would affect access to sea)

" '. . . The inability of sea-going vessels to navigate the channel to a point in front of plaintiffs' property resulting from the new bridge is an impairment of the public right of navigation which plaintiffs will suffer along with others. Their loss, if any, will be damnum absque injuria.' "

Frost v. *Washington County Ry. Co.,* (Me) 51 A. 806 (Railroad bridge over navigable water affecting access to sea)

"The only right of the plaintiff interfered with by the defendant company was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property, nor even his private right. It could not be bought, sold, leased, or inherited. He did not earn it, create it, or acquire it. He did not own it as against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public, and not for any particular individual. . . ."

Marine Airways v. *State,* (N.Y.) 104 N.Y.S. 2d 964, 967, Affd. 116 N.Y.S. 2d 778 (Upstream shipbuilders sought damages resulting from highway bridge)

" 'Distinguished from the right of access is the right of navigation, which is exclusively a public right. One is not to be confused with the other. The bridge here was constructed in accordance with proper public authorization. The claim that it constitutes a public nuisance or an unlawful interference with navigation is not maintainable. Where there is a lawful interference with naviga-

tion, a member of the public has no right to compensation therefor, and the owner of land abutting the water is not in a better position to claim compensation so long as high right of access is not denied him. This view is supported by the weight of authority in this country. (Citations omitted.)' "

St. Regis Paper Co. v. *New Hampshire,* 26 A. 2d 832, 838 (State authorized dam across navigable river)

"Since the public right is not a private one, it follows that individual members of the public entitled to enjoy the right enjoy the right in a personal capacity only derivatively. Their rights are not property rights and are not vested. Strictly, the rights are more properly to be termed privileges, which may be taken away, altered or qualified. . . ."

Crary v. *State Highway Commission,* (Miss) 68 So. 2d 468, 472 (Highway bridge impaired use of riparian owner's frontage)

"In summary, we conclude that the erection by appellee of the bridge constitutes the imposing of an additional public use upon property (Gulf of Mexico) already set aside for public purposes."

State v. *Masheter,* (Ohio) 203 N. E. 2d 325, 327 (Highway bridge restricted vertical clearance for upstream owner)

"Every riparian owner has the right of ingress and egress between his land and the water. In addition, as a member of the public, he has the right to travel on navigable streams. It is important to distinguish these rights. The right to

go from his land to the river and from the river to his land is a private property right of the riparian owner. *Navigation on public waters is exclusively a public right.* Everyone has an equal right to the use of the water for travel and transportation." (Emphasis added)

Federal Authorities:

Miller v. *City of New York,* 109 U.S. 385, 3 S. Ct. 228, 233 (Upstream owner claimed Brooklyn Bridge would prevent sailing ships from reaching his docks)

" 'The plaintiff *is not deprived of his property nor of the enjoyment of it;* nor does he from that cause suffer any damage different in character from the rest of the public. . . .' " (Emphasis added)

U.S. v. *Commodore Park,* 324 U.S. 386, 65 S. Ct. 803, 805 (Dredger tailings from seaplane under construction blocked navigable waterway)

" 'Second. Nor does a riparian owner acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that privilege by an authorized governmental change in a stream. . . .' "

U.S. v. *Rands,* 389 U.S. 121, 122–123, 88 S. Ct. 265, 266–267 (Lock and dam project prevented use of riparian land as a port site)

". . . 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the

United States * * *. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.' Gilman v. City of Philadelphia, 70 U.S. (3 Wall.) 713, 724–725, 18 L.Ed. 96 (1865). . . ."

Bellaire, Benwood & Wheeling F. Co. v. *Interstate Bridge Co.*, 40 F.2d 323 (Highway bridge impaired operation of ferry)

" 'The plaintiff only shares in the public right. He had no right against the public. The sovereign had the absolute control of it, and could regulate, enlarge, limit or even destroy it, as he might deem best for the whole public and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby. . . .' "

Two additional and collateral arguments raised by petitioners merit clarification.

First petitioners contend that private access rights on navigable waterways must coincide with private access rights in highways. The California Supreme Court decision meets and disposes of the highway-waterway analogy as follows:

"We also reject plaintiffs' contention that our highway access cases (see Bacich v. Board of Control (1943) 23 Cal.2d 343; Breidert v. Southern Pac. Co. (1964) 61 Cal.2d 659) require that compensation be paid for any substantial impairment of plaintiffs' right of access. We are not persuaded that the analogy between highway access and navigational access will bear close scrutiny. The right of access to a land highway derives from the 'land

> service road' concept, whereby roads are conceived of as arteries constructed through condemnation of private land for the purpose of serving other land abutting on them, rather than for the purpose of serving public traffic passing over them. (See Note (1965) 38 So. Cal.L.Rev. 689, 690, and authorities cited in fn. 9 thereof.) Principles applicable to such a right cannot reasonably be extended to the case of navigable waterways, which constitute a natural resource retained within the public domain for the purpose of serving public traffic in accordance with the greatest common benefit." (Pet. A. 39–40)

This court as recently as November of 1967 similarly pointed out that ship access over navigable waters is a public resource not a private right. *U.S.* v. *Rands,* 389 U.S. 121, 126, 88 S. Ct. 265, 268.

The second collateral issue relates to ownership of the bed of the Stockton Channel. Petitioners allege that it *may* not be owned by the State of California. The same argument was made to and rejected by the California Supreme Court when it denied a Petition for Rehearing.

Possible *subsurface* ownership of the channel has no relevance in a determination of petitioners' downstream *surface* access rights, for several reasons:

1. Petitioners do not, and cannot themselves claim ownership of the channel bed. Therefore, its possible private ownership by third parties would not enhance their rights.

2. The construction of the twin bridges downstream does not impair petitioners' nonexistent use of the

channel bed. The sole issue here involves changes in the *surface* usage of a navigable waterway. For example, we are not concerned in this action with the effect a state-installed sewer pipe might have on an oyster bed. (cf. Lovejoy v. Norwalk, 112 Conn. 199)

3. Finally and most significantly the California Supreme Court decision does not rest on ownership of the channel bed. The *water* itself as a mechanism of transportation and commerce is the natural resource which the Court found inappropriate for private ownership. They held that the right to sail upon navigable waters is a public privilege which can be regulated in the interest of commerce without compensation. A riparian owner's private right to use the *bed* of a navigable channel which is owned by third parties must await another case for determination.

IV. Conclusion

The California Supreme Court's decision is in accord with both federal and state authority leaving no substantial federal question to be resolved by this Court.

The opinion and supporting record show conclusively that:

1. The construction of an interstate highway bridge downstream from petitioners' property affected only their public right of navigation and did not deprive petitioners of property rights in violation of the United States or California Constitutions.

2. California's authority to define the right to private usage of its navigable waterways has not been exceeded or abused.

3. *Subsurface* ownership was not a determining factor in delineating the scope of petitioners' right to use the *surface* of adjacent navigable waterways.

WHEREFORE, Respondent respectfully prays that the Petition for a Writ of Certiorari to the Supreme Court of the United States be denied.

Dated: January 18, 1968

Respectfully submitted,

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